

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1070

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
VICTOR CUMBERBATCH, :
Defendant-Appellant. :
-----X

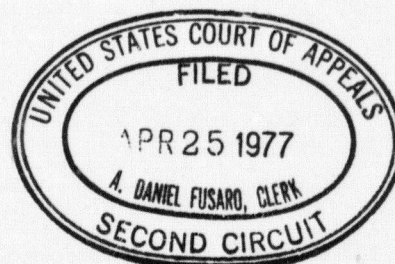
Docket No.
77-1070

B
P/S

APPENDIX FOR APPELLANT

ROBERT BLOOM
Attorney for Appellant
351 Broadway
New York, New York 10013
(212) 431-4600

LAWRENCE STERN
Of Counsel



PAGINATION AS IN ORIGINAL COPY

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INDICTMENT 76 Cr. 1076

JGE:bj
73-0584
11-392

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

-v-

VICTOR CUMBERBATCH,

Defendant.

:

:

:

:

INDICTMENT

76 Cr. 1074

-----x

The Grand Jury charges:

1. From on or about the 1st day of January 1973, up to and including the 5th day of June, 1973, in the Southern District of New York, VICTOR CUMBERBATCH, the defendant, and Oscar Lee Washington, Pedro Mario Monges, and Raul Estremera, named herein as co-conspirators but not as defendants, unlawfully wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others to the Grand Jury known and unknown, to commit an offense against the United States, to wit, a violation of Section 2113(a) of Title 18, United States Code.

2. It was part of said conspiracy that VICTOR CUMBERBATCH, the defendant, together with co-conspirators Oscar Lee Washington, Pedro Mario Monges, and Raul Estremera, would, by force, violence, and by intimidation, take from the person and presence of another property and money in the approximate amount of \$25,231.06 belonging to, and in the care, custody, control, management and possession of the First National City Bank, 505 Southern Boulevard, Bronx, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

OVERT ACTS

In furtherance of said conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On February 9, 1973, VICTOR CUMBERBATCH, the defendant, and co-conspirators Oscar Lee Washington, Pedro Mario Monges, and Raul Estremera entered the First National City Bank, 505 Southern Boulevard, Bronx, New York.

2. On February 9, 1973, co-conspirator Oscar Lee Washington struck an employee of the First National City Bank, 505 Southern Boulevard, Bronx, New York, on the head with a pistol.

3. On February 9, 1973, co-conspirators Oscar Lee Washington and Pedro Mario Monges removed quantities of cash from the cash drawers of the First National City Bank, 505 Southern Boulevard, Bronx, New York.

4. On February 9, 1973, VICTOR CUMBERBATCH, the defendant, removed a submachine gun from under his coat and thereafter used it to strike an employee of the First National City Bank, 505 Southern Boulevard, Bronx, New York.

5. On February 9, 1973, VICTOR CUMBERBATCH, the defendant, and co-conspirators Oscar Lee Washington, Pedro Mario Monges, and Raul Estremers left the First National City Bank, 505 Southern Boulevard, Bronx, New York.

JGE:bj
73-0584
11-392

SECOND COUNT

The Grand Jury further charges:

On or about the 9th day of February, 1973, in the Southern District of New York, VICTOR CUMBERBATCH, the defendant, unlawfully, wilfully and knowingly did carry a firearm during the commission of a felony for which he could be prosecuted in a Court of the United States, to wit, a violation of Title 18, United States Code, Section 371.

(Title 18, United States Code, Section 924(c)(2))

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

INDICTMENT 73 Cr. 319

73 CRIM. 319

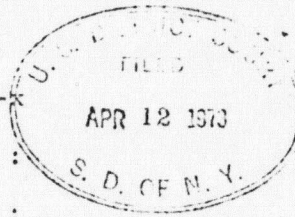
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

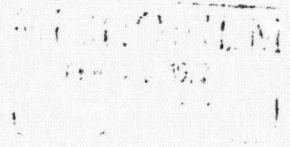
OSCAR LEE WASHINGTON,
RAUL ESTREMER, and
PEDRO MARIO MONGES, and
VICTOR CUMBERBATCH,

Defendants.



INDICTMENT

73 Cr.



The Grand Jury charges:

On or about the 9th day of February, 1973, in the Southern District of New York, OSCAR LEE WASHINGTON, RAUL ESTREMER, PEDRO MARIO MONGES and VICTOR CUMBERBATCH, the defendants, unlawfully, wilfully and knowingly did by force, violence and by intimidation take from the person and presence of another property and money, to wit, approximately \$25,231.06 of United States currency, which currency belonged to and was in the care, custody, control, management and possession of the First National City Bank, 505 Southern Boulevard, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

SECOND COUNT

The Grand Jury further charges:

On or about the 9th day of February, 1973, in the Southern District of New York, OSCAR LEE WASHINGTON, RAUL ESTREMER, PEDRO MARIO MONGES, and VICTOR CUMBERBATCH, the defendants, unlawfully, wilfully and knowingly did so in various persons and put in jeopardy the life of

various persons by the use of dangerous weapons to wit, firearms, while committing the offense described in the first count of this indictment.

(Title 18, United States Code, Sections 2113(d) and 2.)

THIRD COUNT

The Grand Jury further charges:

On or about the 9th day of February, 1973, in the Southern District of New York, OSCAR LEE WASHINGTON, RAUL ESTREMER, PEDRO MARIO MONGES, and VICTOR CUMBERBATCH the defendants, unlawfully, wilfully and knowingly, with intent to steal and purloin, did take and carry away property and money, to wit, approximately \$25,231.06 belonging to and in the care, custody, control, management and possession of the First National City Bank, 505 Southern Boulevard, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(b).)

Edward J. Pape
FOREMAN

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

DOCKET ENTRIES

deft never arrested
in State prison from start)

VS CUMBERBATCH, VICTOR

Case Filed
Mo 11 Day 23
No. of Defs
* 01

76 1076

FELONY Fel ☒ District Office

(LAST, FIRST, MIDDLE)

JUVENILE

U.S. MAG.
CASE NO

U.S. TITLE SECTION

18:371
18:924(c)(2)

OFFENSES CHARGED

Consp. to commit bank robbery
Possession of firearm during commission
of felony

ORIGINAL COUNTS

1
2

SUPERSEDING
COUNTS

KEY DATES & INTERVALS

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Customs & Border 11-23-76	Information 11-23-76	12-2-76	12-13-76
U.S. District Court 12-2-76	Superceding Indictment 12-2-76	12-2-76	12-16-76
U.S. District Court 12-2-76	U.S. District Court 12-2-76	U.S. District Court 12-2-76	U.S. District Court 12-2-76

AMT	Set	10% De	Surety
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MAGISTRATE				OUTCOME
Search Warrant	Issued	Return	Initial/No.	DISMISSED
Summons	Issued	Return	Initial/No.	HELD FOR GJ OR OTHER PRO
Arrest Warrant	Issued	Return	Initial/No.	HELD FOR GJ OR OTHER PRO
Arrest Warrant	Issued	Return	Initial/No.	HELD FOR GJ OR OTHER PRO
Arrest Warrant	Issued	Return	Initial/No.	HELD FOR GJ OR OTHER PRO
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Arrest Warrant	Issued	Return	Initial/No.	HELD FOR GJ OR OTHER PRO
Arrest Warrant	Issued	Return	Initial/No.	HELD FOR GJ OR OTHER PRO

U.S. Attorney

ATTORNEYS

Defence: CJA ☒ Ret ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD ☐ CC

Jeremy G. Epstein
791-0036

219

Robert Bloom
351 Broadway, N. Y. C.

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE BY
11-23-76		Filed Indictment & referred to Palmieri, J. as related to 73 Cr. 319 (ELP).....Cannella, J.	(a) (b)
11-29-76		Filed Affidavit of Jeremy G. Epstein, AUSA in support of writ. RET: 12-2-76.	(a) (b)
12-2-76		Deft not present..(No attypresent) Court directs a not guilty plea be entered...Bail fixed at \$50,000 Cash or surety. Referred to Palmieri, J...as a related case to 73Cr.319 Deft in Jail on Writ.....Motley, J....	(a) (b)
12-14-76		Filed affdvt. & notice of motion to dismiss the indictment..	(a) (b)
12-16-76		Filed Memo Endorsed on Motion to dismiss filed 12-14-76..... Motion denied.see opinion 12-15-76.PALMIERI, J	m-n
12-16-76		Filed Opinion No. 45446 - for the reasons stated defendant's motion to dismiss is denied.PALMIERI, J	m-n

CONTINUED ON PAGE 2.

DATE	76 CR 1076	PALMIERE,
12-13-76	Deft, on Writ (Robert Bloom of counsel) Pleads NOT GUILTY. INDICTMENT 73 CR 319 as a related case Dismissed on Defts Motion with prejudice. TRIAL BEGAN (JURY 2 Alts)	
12-14-76	TRIAL CONTINUED	
12-15-76	TRIAL CONTINUED	
12-16-76	TRIAL CONTINUED AND CONCLUDED - VERDICT DEFT GUILTY AS CHARGED,COUNTS 1 & 2. Bail Revoked. DEFT REMANDED.PSI ORDERED. Sentence adj. 12 Noon Dec.17, 1976.	
12-17-76	SENTENCE ADJD. FEBRUARY 8,1977. PALMIERI,J	
1-17-77	Filed post trial motion to set aside verdict and grant a new trial....Etc..	
2-3-77	Filed Govts memorandum in opposition to motion for new trial.	
2-10-77	Filed Judgment(Atty.Robert Bloom,present) the deft is committed for imprisonment for a period of FIVE YEARS on Count 1. TEN YEARS on Count 2 to run CONSECUTIVELY to each other and to run CONSECUTIVELY to the state sentence the deft is presently serving at Attica Correctional Facility, Attica, N.Y..... Palmieri,J./....Ent.2-14-77....	
2-10-77	Leave to appeal in forma pauperis is granted....Palmieri,J.	
2-18-77	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A.	
3-1-77	Filed commitment & entered return and executed same by forwarding copy to Attica Correctional Facility,Attica,N.Y. Dated:2-15-77.	
3-3-77	Filed notice that the 1st supplemental record on appeal has been certified and transmitted to the U.S.C.A.	
3-3-77	Filed transcript record of proceeding dtd: 12/13,14,15,16, 1976	
3-3-77	" " " " " " 12/17,22/10/77	

CHARGE TO THE JURY

2 CHARGE OF THE COURT

3 THE COURT: (Palmieri, J.) First of all, ladies
4 and gentlemen, let me thank you very sincerely for the care-
5 ful attention you paid throughout this trial. It was evident
6 to me and I am sure evident to all those who participated in
7 this trial, that you were attempting to follow the evidence as
8 it was being presented, to understand it, and by your actions
9 and attitude, you have really indicated a sincere devotion
10 to the stupendous responsibilities which are about to be
11 placed upon your shoulders.

12 You are the sole judges of the facts of the case.
13 I told you at the outset of the case and it has been repeated
14 to you by defense counsel at least twice in summation and I
15 repeat it again, that the facts of the case, where the truth
16 lies, what significance there is to the truth as you find it,
17 are all the exclusive province of you ladies and gentlemen
18 as jurors in the case.

19 This is an important case for the government and
20 it is an important case for the defendant, and both sides are
21 entitled to a true and just verdict of twelve jurors, not
22 twelve jurors and a judge, twelve jurors.

23 I have no desire to push you, to tempt you, to
24 stimulate you in any way to perform your function in some
25 direction, or in one direction or another.

I have great respect for jury verdicts and I leave this stupendous function unreservedly where it belongs, in your hands.

Now, it may be that during the course of my charge I will refer to some of the evidence and it may be, since I am human and fallible, that I may misstate that evidence. I hope I don't, but I may. If I do, or if what I say about the evidence does not accord with your own recollection, you should rely upon your recollection, not upon mine. Rely upon your recollection and not upon the recollection of the attorneys.

Do you remember yesterday morning on one occasion there were interruptions of the summation, a number of interruptions because one attorney felt that the other attorney wasn't properly stating the evidence? I said repeatedly what I am telling you now.

The law gives me the privilege of commenting on the evidence. I can even go so far, if I choose, to tell you whom I think you should believe and whom I think you shouldn't believe, provided, of course, that I make it perfectly clear as I have tried to do, that this fact-finding function is exclusively yours. Although I may comment on the evidence, I very, very rarely exercise that privilege.

I rarely do it because I feel that we who are exposed to litigation constantly have probably lost the

sharp edge of our discernment about what goes on outside of the courthouse and I am grateful for your presence here. I understand profoundly, and I am convinced without any question in my own mind, that this is the very best way that we have for ascertaining the truth. It has been proven by time-honored experience and by the scrutiny of fine minds over many, many generations, that the best way we have of ascertaining the truth is to draw people from various walks of life, persons who have been affected by varying experiences, varying exposures to human affairs, so they can bring to bear on the facts of the case, the good judgment and common sense that is derived from their adult experiences.

You not only have the good names of this court in your hands, you are an indispensable part of this court and, indeed, when you retire to consider your verdict, you will be the most important part of the court, because the personality of the judge is of no importance, the personalities of the attorneys are not of any importance.

They have, at this point, substantially completed their duties in this case. I will have substantially completed my duties at the time you retire to deliberate. Everything that we have done has been done for the purpose of permitting you to receive and to understand this evidence, and, base your verdict upon the truth as you find it, subject

2 to the law as I charge you.

3 Now, unfortunately, I have been obliged on more
4 than one occasion to intervene on my own motion -- I think I
5 interrupted one or two of the summations -- I may have also
6 interposed objections to questions myself. I may have given
7 instructions to counsel.

8 In doing that, ladies and gentlemen, I was only
9 performing that which rests upon my shoulders as the presiding
10 officer of the trial. Please, do not attribute to me any
11 desire to interject myself in the case as a fact-finder or
12 as a suggester of fact-finding which you should make. I have
13 no such intent and I don't want you to have the feeling that I
14 have done so.

15 Rulings of law that I have made, any discharge of
16 my function at any point during the trial, any requests or
17 instructions which I may have given to counsel, should not
18 be considered by you as evidence.

19 What we say, we lawyers and judges say, is not
20 evidence. We weren't there, we are not witnesses. We haven't
21 been sworn to give you any testimony.

22 All we can do is to review the testimony -- that
23 is the lawyers' function -- to develop it and review it and
24 present it to you, and for me to do my best to explain the
25 applicable law based upon the facts in the case.

2 Remember, as I told you at the outset, the evidence
3 consists of the testimony, of the exhibits marked in evidence,
4 and of the stipulations of counsel.

5 Since this is a criminal case, the burden rests
6 upon the government and never shifts to the defendant. It is
7 the government which has the burden of proving the defendant
8 guilty beyond a reasonable doubt and the defendant is presumed
9 to be innocent throughout the trial and throughout the jury
10 deliberations, until such time, if that time ever comes, when
11 the presumption of innocence is overcome by proof of his guilt
12 beyond a reasonable doubt.

13 You may not find the defendant guilty if you have
14 a reasonable doubt about any of the facts necessary to con-
15 stitute the crime.

16 A reasonable doubt may be based on the evidence
17 or the lack of evidence in the case. What is a reasonable
18 doubt?

19 A reasonable doubt is such a doubt that would
20 cause a reasonable person to hesitate to act in the important
21 and serious affairs in life. It is a doubt which a reasonable
22 person has after carefully weighing all the evidence.

23 A reasonable doubt is one which appeals to your
24 reason, your judgment, your common sense and your experience.

25 Beyond a reasonable doubt does not mean to a

1 mathematical certainty or beyond all possible doubt. Reason-
2 able doubt is not caprice, whim or speculation. It is not an
3 excuse to avoid the performance of an unpleasant duty. It is
4 not sympathy for the defendant. Vague, speculative or imagin-
5 ary qualms or misgivings are not a reasonable doubt.

6 If, after a fair, impartial and careful con-
7 sideration of all the evidence you are convinced of the guilt
8 of a defendant, you must convict him.

9 If, on the other hand, after such a fair, im-
10 partial and careful consideration of all the evidence, you
11 doubt the defendant's guilt, you must acquit him.

12 Now, please don't feel that if I refer to cer-
13 tain aspects of the evidence that the other evidence is unim-
14 portant. All the evidence is before you, all the arguments
15 of counsel are before you, and you should consider all the
16 evidence and all their arguments.

17 I may refer to some evidence and not to other
18 evidence. That is not because I wish to downgrade certain
19 evidence or upgrade other evidence. It is you and you alone
20 who will decide what is important and what is unimportant.

21 You are entitled to the opinion that there may
22 be evidence in the case to which I have not referred which is
23 more important than any evidence to which I have referred.
24 That is another way of saying that you are the exclusive judges
25

of the facts in the case.

With these preliminary instructions in mind, let us turn to the charges against the defendant as contained in the indictment. I must remind you that you must accord no weight whatever to the fact that an indictment was returned against the defendant.

An indictment is not evidence. It is a procedural document giving the defendant notice of the charges and describing the charges made against the defendant. I will provide you with a copy of the indictment which you must not use as an exhibit in evidence, because it is not; it is just the framework, the legal framework within which the case is tried.

It will keep you on the right track in considering your verdict. There are only two counts, and I will tell you later, you must return a verdict with respect to both counts, but in a special way which I will guide you about in a moment.

The important thing to remember at this point is that the indictment is simply a guide with respect to the nature of the charges, and it constitutes proof of nothing.

Now, the first count is a conspiracy count and before you may convict the defendant under this count, the following essential elements must be established beyond a reasonable doubt. If you have a reasonable doubt with respect to any one of these essential elements, it is your duty to

2 acquit the defendant.

3 First, you must be satisfied that the conspiracy
4 charged did in fact exist, i.e, sometime between January 1,
5 1973 and July 25, 1973; that an agreement existed between
6 the defendant on trial and any other co-conspirator, whether
7 or not on trial or named in the indictment.

8 Second, that it was part of the agreement to accom-
9 plish the following object: to take by force, violence or
10 intimidation from the person and presence of another, money
11 in the approximate amount of \$25,231.06 belonging to the First
12 National City Bank.

13 Third, that the defendant knowingly and wilfully
14 associated himself with the conspiracy.

15 Fourth, that one of the conspirators knowingly
16 committed at least one of the overt acts set forth in the
17 indictment at or about the time and place alleged.

18 Now, I will read the conspiracy count up to the
19 point of the overt acts and I will explain that to you and
20 then I will read the overt acts and explain the overt acts.

21 The conspiracy count reads as follows:

22 "From on or about the first day of January, 1973
23 up to and including the fifth day of June, 1973, in the
24 Southern District of New York Victor Cumberbatch, the defendant,
25 Oscar Lee Washington, Pedro Monges and Raul Estremera, named

2 herein as co-conspirators but not as defendants, unlawfully
3 wilfully and knowingly did combine, conspire, confederate and
4 agree together and with each other and with others to the
5 grand jury known and unknown, to commit an offense against
6 the United States, to wit, a violation of Section 2112(a)
7 of Title 18, United States Code.

8 "2. That it was part of said conspiracy that
9 Victor Cumberbatch, the defendant, together with co-conspirators
10 Washington, Monges and Estremera would by force, violence and
11 by intimidation take from the person and presence of another,
12 property and money in the approximate amount of \$25,231.06
13 belonging to and in the care, custody and control, management
14 and possession of the First National City Bank, 505 Southern
15 Boulevard, Bronx, New York, the deposits of which were then
16 insured by the Federal Deposit Insurance Corporation."

17 Let me explain the conspiracy charge up to that
18 point. The following part of the conspiracy charge which I
19 haven't read, which I will get to in a moment, refers to the
20 overt acts and there are five of them and I will read them
21 in a moment.

22 What do we mean by conspiracy? The term is
23 derived from two Latin words, con and spirare, meaning "with"
24 and "to breathe". Literally, it means to breathe together;
25 it is a partnership in crime.

2 The essence of the crime of conspiracy is the
3 agreement itself, not the actual action taken pursuant to it.
4 Proof that an agreement existed is therefore the most basic
5 and important element in a case seeking to charge a con-
6 spiracy.

7 From the point of view of the law, there is a
8 danger to the public when two or more persons conspire to
9 violate the law because by virtue of the aggregation of
10 numbers, the offense assumes a formidable aspect of concern
11 to the public.

12 A conspiracy may be defined as a combination of
13 two or more persons by means of concerted action, to accom-
14 plish an unlawful purpose or to accomplish a lawful purpose
15 by unlawful means.

16 Of course, those who enter illegal agreements
17 rarely do so openly. For this reason, the government is not
18 required to present direct evidence of specific words or
19 deeds through which the agreement has been communicated.
20 You are permitted to infer agreement from facts and circum-
21 stances, such as a clear, prolonged cooperation, which falls
22 short of an actual expression of assent.

23 If, for example, several persons gather together
24 and shortly thereafter there was concerted action among them,
25 with each of them doing something to relate it with the acts

2 of another, all of which contributed in the same or similar
3 manner toward the accomplishment of the same unlawful objec-
4 tive, such evidence would support the inference that those
5 persons had conspired together to accomplish that purpose.

6 In other words, it is not necessary to constitute
7 a conspiracy that two or more persons should meet together
8 and enter into a explicit or formal agreement to violate the
9 law. It is not necessary that they should directly by words or
10 in writing, state what the unlawful schemes are to be or
11 the details of the plan or the means by which the unlawful
12 schemes were to be carried out.

13 Indeed, it would be extraordinary if there were
14 such a formal or written agreement. When men in fact embark
15 upon a criminal conspiracy, much is left to unexpressed under-
16 standing.

17 It is sufficient if two or more persons in any
18 manner or through any contrivance implicitly or tacitly come
19 to a mutual understanding to accomplish a common and unlawful
20 design, knowing its object.

21 However, you cannot find that the government has
22 proved this first element of the offense, that is, the exis-
23 tence of the conspiracy, unless you are convinced beyond a
24 reasonable doubt, that the parties shared a desire and under-
25 standing to engage in a common understanding, a common under-

2 taking, directed toward the accomplishment of the unlawful
3 object or involving the use of unlawful means.

4 Before you can find that a conspiracy existed, you
5 must determine what the unlawful purpose, purposes, or
6 means of the agreement were.

7 If you do not find beyond a reasonable doubt that
8 there was either an unlawful purpose or purposes or means
9 involved in the agreement, then the conspiracy could not exist
10 and you would be then obliged to acquit the defendant.

11 In determining whether the conspiracy charged in
12 this indictment actually existed, you must consider the evi-
13 dence with respect to the acts, declarations and conduct of
14 the alleged conspirators as a whole and the reasonable in-
15 ferences to be drawn from such evidence.

16 Generally, as I have said, criminal agreement is
17 a matter of inference, deduced from the evidence.

18 Now, the period of time charged in the indictment
19 runs from about January first, 1973 to June 5th, 1973. It is
20 not necessary for the government to prove that the conspiracy
21 started and ended on those specific dates. It is sufficient
22 if you find that in fact the conspiracy was formed and that
23 it existed for some substantial time within the period set
24 forth in the indictment, and that at least one overt act was
25 committed during that period.

2 Indeed, the proof in this case would indicate so
3 far as the bank robbery was concerned and there is no dispute
4 in this case that the bank robbery did take place on the date
5 of February 9th, 1973 at the First National City Bank in The
6 Bronx, that this conspiracy took place on that day.

7 How much later it took place depends on certain
8 peripheral evidence but I think that you can infer from the
9 fact of the robbery itself that there was a conspiracy at
10 least on that day.

11 Now, the indictment charges that the conspiracy
12 in question had as its object the violation of the bank
13 robbery statute, Title 18, U. S. Code, Section 2113(A).
14 That statute provides in pertinent part as follows:

15 "Whoever by force and violence or by intimidation
16 takes or attempts to take from the person or persons of
17 another any property or money or any other things of value,
18 belonging to or in the care, custody, control, management or
19 possession of any bank", that is the end of the quote and
20 there follows a reference to the penalties with which you are
21 not concerned.

22 Section 2113(f) of Title 18, U. S. Code, defines
23 the term bank as follows:

24 "As used in this section the term bank means any
25 member bank of the Federal Reserve System and any banking

1

AR

521

2

association, trust company, saving bank or other banking

3

institution organized or operating under the law of the

4

United States, and any bank, the deposits of which are in-

5

sured by the Federal Deposit Insurance Corporation."

6

In order to find that an agreement existed to

7

violate the bank robbery statute, you must find the following

8

beyond a reasonable doubt. If you have any reasonable doubt

9

with respect to any of the following, you must acquit the

10

defendant:

11

First, that the First National City Bank, 505

12

Southern Boulevard, Bronx, New York, was a bank the deposits

13

of which were insured by the Federal Deposit Insurance Cor-

14

poration.

15

Second, that the defendant and one or more co-

16

conspirators agreed to take money which belonged to or was

17

in the care, custody, control, management or possession of

18

that bank.

19

Third, that the defendant and one or more co-

20

conspirators agreed to take the money from the person or

21

presence of another.

22

Fourth, that the defendant and one or more of the

23

co-conspirators agreed to accomplish this taking by force

24

and violence or by intimidation.

25

Fifth, that the defendant wilfully did the act or

acts charged.

The first three of these elements are simple enough as they have been stated and do not require elaboration.

As to the fourth, the taking of the money must have been accomplished by force and violence or intimidation and here a few words may be useful.

With respect to this element the government is not required to show that force and violence were actually used against anyone, if it proves beyond a reasonable doubt that the taking was a result of intimidation. That is, the result of placing another person or persons in fear.

Intimidation may be established by proof of circumstances that are normally calculated to arouse fear in the ordinary run of human beings. So if it happens that some extraordinarily timid person was put in fear by words or actions that would not normally frighten anyone, that would not be the kind of intimidation with which the statute is concerned.

On the other hand, if the proof shows conduct by a defendant which would normally be expected to generate fear in another person, then it is not necessary that the government prove those affected actually experienced some terror or panic or hysteria.

2 The question, in short, is an objective one. It
3 is whether the government sustained its burden of showing
4 beyond a reasonable doubt conduct by an accused which was of
5 such a nature as to provide a sensible and expected basis
6 for the creation of fear in another.

7 Incidentally, it is not necessary for the govern-
8 ment to prove the success or the completion of the object of
9 the conspiracy. The conspiracy is basically the agreement
10 to violate the law and it may exist even though the final
11 objectives were never accomplished. Of course, we have the
12 testimony in this case that over \$20,000 was taken from the
13 bank and that the robbers left the bank with it.

14 If upon consideration of the evidence you find
15 beyond a reasonable doubt that the minds of at least two
16 of the alleged conspirators met in an understanding way and
17 that they agreed, as I have explained, the conspiratorial
18 agreement to you, to work together in furtherance of the
19 unlawful scheme charged in the indictment, then proof of the
20 existence of the conspiracy, but only its existence is
21 established.

22 Let me turn to the element of the membership in
23 the conspiracy. This assumes that you have already found that
24 there was a conspiracy. You may not find a defendant guilty
25 of the crime of conspiracy unless you find beyond a reason-

able doubt that he consciously and deliberately joined the conspiracy or agreement, knowing of its unlawful purpose and intending to aid and assist in the accomplishing of that purpose.

In reaching your conclusion as to an individual defendant, you are required to determine what that individual understood to be the character of the agreement. The purpose to associate in a wrongful enterprise is an indispensable part of the crime of conspiracy.

A person who unwittingly helps to further an unlawful venture but lacks awareness of its wrongful nature has not committed the crime of conspiracy. You must decide what that individual understood to be the character and purposes of the agreement, and, as I have stated, what the unlawful purpose or purposes of the agreement were.

Knowledge on the part of an individual is most generally a matter of inference from his conduct and the circumstances shown by the evidence. Consideration of those circumstances enable one to infer whether the individual had the requisite knowledge. It is not necessary that one be fully informed as to the details and scope of the conspiracy in order to justify an inference of knowledge on his part.

The question for you here is did he join with the others with a knowledge of at least some of the common basic

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purposes in the central or primary objectives and aims of the conspiracy. If he knows there is a conspiracy and if he has knowledge of its basic objectives and aims and joins, then he adopts as his own the past and future acts of all the other conspirators.

The guilt of a conspirator is not measured by the extent or duration of his participation. As long as he was in fact a conspirator, he is guilty of the crime of conspiracy, even if his participation was less than that of other co-conspirators.

Before you can find the defendant guilty, you must be satisfied beyond a reasonable doubt that he intended to associate himself with the conspiracy, and further its unlawful purposes.

How do you determine whether a person has a certain intent? It is not possible short of express admission by him, to probe directly into his mind and see whether he had this requisite intention. You can only determine that question by intelligent and careful consideration of his activities and statements in the light of the circumstances surrounding what is shown by the evidence in the case. With knowledge of his actions and statements you may draw logical inferences and conclusions as to his intent.

Mere association with other conspirators or

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knowledge of the conspiracy without participation is not sufficient to constitute membership. What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends.

Let me allude to the overt acts. I will read them first and then explain them. The overt acts are listed in the indictment as follows:

"In furtherance of said conspiracy and to effect the objects thereof the following overt acts among others were committed in the Southern District of New York."

I might inject here that the Bronx is within the Southern District of New York. The territorial jurisdiction of this court extends from the tip of Manhattan Island through the Bronx and Westchester to just below Albany.

"1. On February 9, 1973 Victor Cumberbatch the defendant and co-conspirators Oscar Lee Washington, Pedro Monges and Raul Estremera entered the First National City Bank 505 Southern Boulevard, BRonx, New York.

"2. On February 9, 1973, co-conspirator Oscar Lee Washington struck an employee of the First National City Bank, 505 Southern Boulevard, Bronx, New York, on the head with a pistol."

"3. On February 9, 1973, co-conspirators Washington and Monges removed quantities of cash from the cash drawers of the First National City Bank, 505 Southern Boulevard, Bronx, New York.

"4. On February 9, 1973, Victor Cumberbatch, the defendant removed a sub-machine gun from under his coat and thereafter used it to strike an employee of the First National City Bank, 505 Southern Boulevard, Bronx, New York.

"5. On February 9, 1973, Victor Cumberbatch, the defendant and co-conspirators Washington, Monges and Estremera, left the First National City Bank, 505 Southern Boulevard, Bronx, New York."

Let me say, ladies and gentlemen, that you do not have before you the task of determining the guilt or innocence of Washington, Monges or Estremera. You need not refer to that in any way. In other words, their guilt or innocence is not before you. It is extraneous to this case. You are concerned with the guilt or innocence, if any, of the defendant Cumberbatch.

Now, this last element that you must consider is the element of the overt acts. Assuming that you have found the alleged conspiracy existed and that the defendant Cumberbatch was a member of it, now the last element is whether an overt act took place in furtherance of the conspiracy.

2 You may not find the defendant guilty unless and
3 until you are convinced at least one overt act as charged in
4 the indictment was committed, either by him or by one of the
5 co-conspirators.

6 The overt act requirement serves certain procedural
7 purposes with which you need not be concerned. Additionally,
8 and perhaps a more important reason for the requirement is
9 that the agreement is not thought to pose a danger to the
10 community sufficient to warrant criminal prosecution, until
11 and unless some step is taken toward achievement of its ends.
12 The purpose of the requirement to prove an overt act is that
13 while parties might conspire and agree to do unlawful things,
14 they may change their minds or even abandon the project and
15 do nothing to carry it into effect.

16 The prosecution is not required to set forth in
17 the indictment each and every act on which it relies to es-
18 tablish the conspiracy or the defendant's participation there-
19 in. NOR is it required to prove each overt act which may have
20 occurred during and in furtherance of the conspiracy.

21 But it is required to prove that at least one such
22 act did take place. The overt act need not be criminal in
23 itself, nor need it be the very crime which is the subject of
24 the conspiracy. A small step forward satisfies the requirement
25 as well as a large one.

The act, however, must be done after the agreement was made and before it terminated. An overt act, therefore, is any step, action or conduct which is taken to achieve, accomplish or further the object of the conspiracy. The act must be an act which follows and tends toward the accomplishment of the plan or scheme charged in the conspiracy count, and must knowingly be done in furtherance of some object or purpose of the conspiracy as charged.

But it need not be performed by the defendant who is on trial.

An act done by or at the direction of one of the participants is sufficient to satisfy the requirement as to all persons who were then parties to the illegal agreement.

When persons enter into a conspiracy to accomplish an unlawful end they become agents for one another in carrying out the conspiracy. And, hence, the acts or declarations of one in the course of the conspiracy and in furtherance of the common purposes are deemed to be the acts of all, and all are responsible for such acts.

Accordingly, if you find in accordance with these instructions, that the conspiracy existed and that the defendant or alleged conspirators were participants in it, then acts done and statements and declarations made in furtherance of the conspiracy by the persons found by you to have been

2 members of the conspiracy, may be considered against the
3 defendant whom you find was a member, even though such actions
4 or declarations were made in the absence and without the
5 knowledge of the defendant.

6 I respectfully suggest, ladies and gentlemen, that
7 you should have no difficulty finding that a conspiracy exis-
8 ted here. In the first place, there is no dispute that I
9 can discern between the parties, that the First National City
10 Bank was held up by four armed robbers on February 9th, 1973.
11 The four armed men were all wearing gloves, invaded the First
12 National City Bank at 505 Southern Boulevard, Bronx, New York,
13 at or about ten a.m. on February 9th, 1973 and within a
14 very few minutes perpetrated a serious crime of violence, or,
15 at the very least, the evidence would justify you in reaching
16 that conclusion.

17 It appears to have been a crime that was well
18 coordinated and well timed. You need only look at the 60
19 or more photographs in evidence, taken by the surveillance
20 cameras and follow them in sequence, I think, to come to the
21 conclusion as to whether or not these four armed robbers were
22 acting in unison and in coordination with each other.

23 It is up to you and you alone to determine whether
24 that was the case, but if you find it was the case, that this
25 was a well-planned, well-coordinated robbery by these four

2 armed men, then I think you should have no difficulty coming
3 to the conclusion that this was indeed a conspiracy.

4 I might point out that the parties do not dispute
5 that the bank was robbed at the time charged. The issue of
6 fact which has been contested in the case is whether the
7 defendant was one of these four armed men.

8 Shortly after the robbery at which over \$25,000
9 of the bank's funds were stolen and untold amounts of personal
10 property and cash of personnel and customers were also taken,
11 we know, or at least you would be entitled to conclude from
12 the testimony of a by-stander, MR. Irvin sitting in his window
13 drinking coffee, that the two get-away cars came down his
14 street in the wrong direction, one an Oldsmobile and the other
15 a Ford, and that he saw six or eight persons, all black, one
16 of them a young woman, get out of these cars and one of
17 the men, he testified, wore a hat with a brim.

18 He believes, he is not sure, but thinks they all
19 got into the van and another car, which was parked in the
20 right direction on his street, except that the young woman
21 he says ran down the street in the other direction toward St.
22 Ann's Avenue.

23 Now, here is a witness who has testified before
24 you and you should ask yourselves, did he tell us the truth?
25 What can we conclude from what he told us?

The crucial question is whether the defendant was a member of this conspiracy. That is the crucial question for you to answer in this case. And in order to determine it, you should consider all of the evidence, all of the arguments of counsel, and you should scrutinize this evidence very carefully.

Here again, I respectfully suggest that if, and I underscore if, you find that he was one of the four armed men at the bank, and one of the men Mr. Irvin saw, you should not have any difficulty concluding that he was a member of the conspiracy. But it is very important that you consider all the evidence as to whether he was among them because that is the issue that has been much contested in the case.

Additionally, the bank surveillance photos, over 60 of them placed in evidence, will entitle you to believe that these men were acting in concert. I will have more to say about the problems presented by the evidence in a moment.

I want to go to count two, the second count of this indictment, which is a very short count and it reads as follows:

"The grand jury further charges that on or about February 9, 1973, in the Southern District of New York, Victor Cumberbatch, the defendant, unlawfully, wilfully and knowingly did carry a firearm during the commission of a felony for which

2 he could be prosecuted in the courts of the United States, to
3 wit, violation of Title 18, United States Code, Section 371."

4 The second count which I just read to you charges
5 the defendant Cumberbatch with carrying a firearm during the
6 commission of a felony. The applicable law reads as follows:

7 "Whoever carries a firearm unlawfully during the
8 commission of a felony for which he may be prosecuted in the
9 courts of the United States, shall be" guilty of a crime.

10 Now, there were words which I omitted that are
11 not pertinent.

12 Before the defendant can be convicted on count two
13 the government must prove beyond a reasonable doubt each of
14 the following elements. If you have a reasonable doubt as to
15 any one of the elements, it is your duty to acquit the defen-
16 dant. Here are the elements:

17 First, that the defendant was committing a felony
18 on or about the 9th day of February, 1973.

19 Second, that during the commission of the felony ,
20 he was carrying a firearm.

21 Third, that he was carrying the firearm unlawfully.

22 Fourth, that the defendant acted knowingly and
23 wilfully.

24 The first element of count two which you must consider
25 is whether the defendant was committing a felony on or about

February 9th, 1973. The felony which the government alleges he was committing was conspiring to violate the bank robbery statute, the crime charged in count one of the indictment.

The government suggests that Cumberbatch is the man with the hat and cape and the Mark 3 semi-automatic carbine, and the man who was identified in those pictures and who has otherwise been identified.

Therefore, if you find that the defendant was guilty of this count, that is count one -- he has committed the felony with which the second count is concerned.

If, however, you conclude that the defendant was not there, that he was not identified, and that he was not guilty of count one, then you must necessarily find him not guilty on count two.

If, however, you find the defendant guilty on count one, then you must consider the remaining elements of count two, because I instruct you as a matter of law, that the crime charged in count one, is a crime which may be prosecuted in the courts of the United States.

You see, if you conclude that he wasn't there, then he couldn't have committed the felony charged in count one, and since the felony charged in count one is the felony that is referred to count two, it necessarily follows that you

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2 have to acquit him on count two. So you can find him not
3 guilty on count one, and if you do, you must find him not
4 guilty one counttwo.

5 You can find him guilty on count one, but that
6 doesn't mean that you have to find him guilty on count two.
7 You can find him guilty on count one and on count two; or
8 you can find him guilty on count one and not guilty on count
9 two. The important thing to remember is that if you acquit
10 him on count one, he is necessarily not guilty on count two.

11 In order for the government to establish the
12 weapon in question was a firearm, it is not necessary that it
13 prove that the gun was in fact fired. Indeed, there is no
14 evidence that I can recall that any shots were fired. These
15 guns were used. RANDall said that he was pistol whipped and
16 struck with the barrel of this carbine while on the floor,
17 but no firearm was fired. It is not necessary for the
18 government to prove that it was.

19 You are entitled to infer that the weapon was a
20 firearm from all the surrounding circumstances, including
21 the use and the appearance of the weapon and the testimony
22 of the firearms expert.

23 Mr. Scroggie, the expert, testified that in his
24 opinion the weapon shown in the bank photographs and there
25 are a number of photographs he referred to in his testimony,

(Exhibits 43,45,46,48,51,52,53,54 and 55, the weapon shown in the bank photographs was a real gun, a Commando Mark 3, 45 caliber carbine, a semi-automatic firearm.

He testified that he couldn't say from the photographs whether the gun was operable.

With respect to his opinion that the gun depicted in the photographs was a real gun, you must weigh that testimony as you must all the other testimony in the case, and I will instruct you about that in a few moments.

With respect to the question of whether or not the gun was operable, I charge that the government does not have to prove that the gun was operable. All the government must prove beyond a reasonable doubt is that the gun was a weapon which was, or was designed to or may have readily been converted to expel a projectile by the action of an explosive or by the action of the frame or receiver of the weapon.

The frame or receiver refers to the trigger mechanism, apart from the barrel. I have in my hand exhibit 54, which shows one of the robbers in profile, holding, extending the gun. You can see the whole contour of the gun in this photograph. It is one of the exhibits on which Mr. Scroggie relied. I trust that you will examine all of these photographs.

The third element that you must find is that the

2 defendant possessed the firearm unlawfully. It means contrary
3 to law, and, in the context of this case, it means carrying
4 a firearm without a permit issued by the New York City Police
5 Department, or any other licensing agency, federal, state or
6 local.

7 Thus, if you find beyond a reasonable doubt that
8 the defendant possessed the firearm without a permit, you may
9 find that he was carrying it unlawfully.

10 There was a stipulation to the effect that the
11 Firearm Control board of New York City did not issue any
12 permit for a Commando Mark 3, 45 caliber machine.

13 I would like to say that Section 436-6.6 of
14 the Administrative Code of the City of New York provides,
15 the heading is "Permits for possession and purchase of rifles
16 and shotguns".

17 "It shall be unlawful to dispose of any rifle or
18 shotgun to any person unless said person is a holder of a
19 permit for possession and purchase of a rifle or shotgun. It
20 shall be unlawful for any person to have in his possession
21 any rifle or shotgun unless said person is a holder of a
22 permit for the possession and purchase of rifles and shotguns."

23 I am reliably informed that this was enacted in
24 1948 and still is in force and you may conclude that the
25 possession of this particular firearm, if you conclude it was a

firearm as described, was possessed unlawfully at the time of this bank robbery.

Let me point out that the stipulation entered into by defense counsel does not, of course, constitute a concession that the gun in the photograph, exhibit 54 or any of the other exhibits, was unlawfully possessed, or constituted a violation of this statute. The stipulation only goes so far as to say that there was no permit granted for this particular gun.

An act is done knowingly if it is done voluntarily and purposely, and not because of mistake, accident, negligence or other innocent reason. An act is wilful if it is done knowingly, wilfully and deliberately, with a bad motive or purpose.

In determining whether the defendant acted knowingly and wilfully, it is not necessary for the government to establish that the defendant knew he was breaking a particular law or particular rule.

Knowledge and wilfullness of a defendant need not be proved by direct witnesses. Like any other fact in issue, it may be established by circumstantial evidence. I will define this term in a moment.

Here, as in other phases of the case, the significant fact is the defendant's state of mind. It is obviously

2 impossible to ascertain or prove directly the operation of
3 a defendant's mind because you cannot look into a person's
4 mind and see what his intentions are or were. The proof of
5 the circumstances surrounding the transaction may well supply
6 an adequate and convincing basis for finding that the de-
7 fendant acted wilfully.

8 The actions of a man must be set in their time
9 and place, just as the full meaning of a word is commonly
10 understood only in its relation to other words of the sentence in
11 context. So the meaning of a particular act or conduct may
12 depend on the surrounding circumstances.

13 In determining this issue you are entitled to
14 consider any statements made and acts done or omitted by the
15 defendant, all facts and circumstances in evidence, which may
16 aid you in determining his state of mind.

17 The burden of proof on the prosecution extends to
18 every essential element of the crimes charged. This speci-
19 fically includes the burden of proving beyond a reasonable
20 doubt the identify of the defendant as the perpetrator of the
21 crime for which he stands charged.

22 If, after examining the testimony and the exhibits
23 and all the surrounding circumstances, you have a reasonable
24 doubt as to the accuracy of the identification, you must find
25 the defendant not guilty on both counts.

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2 You see, this defense is in effect, "I wasn't
3 there, whoever it was, it was somebody else. This evidence
4 doesn't show I was there", or "any evidence that shows I was
5 there is unworthy of belief or worse."

6 If you accept any of these arguments, the defend-
7 ant has a complete defense. He is an innocent man and has
8 been falsely accused of crimes which he didn't commit and
9 should be acquitted.

10 Now, you heard during the course of this case a
11 number of witnesses: James Bolla, the bank manager; Robert
12 Randall, the assistant bank manager; Ridolfo Romero, the
13 guard who was in uniform at the time; Robert Scroggie, the
14 firearms expert; James Murphy, Special Agent of the FBI,
15 Mr. Irvin who sat in his window and saw the get-away cars;
16 Louis Robinson whose Oldsmobile was stolen, the house painter
17 who lived in Brooklyn; James Janson, the FBI agent who I
18 will refer to in a moment, who came from Los Angeles to
19 testify. He used to be in the bank robbery squad of the FBI
20 here in New York; Robert McCartin, who I will talk about
21 in a moment. He also used to belong to the bank robbery
22 squad in New York and is now in Newark, attached to the FBI
23 there. James Jenkins, the fingerprint expert and then Gladys
24 Atkins, the mother of the defendant testified in his defense.

25 Now, you are the sole judges of the credibility

2 of each and every witness who has testified in the course of
3 this trial. You are the sole judges of the weight that
4 should be given to any particular item of proof and that
5 goes for testimony as well as the exhibits. That gives you
6 some measure of the tremendous responsibility placed on your
7 shoulders.

8 You should consider the inherent probabilities of
9 what you heard from each witness. You should consider the
10 demeanor of the witness while on the witness stand. You
11 should consider the force and effect of any contradictory
12 statements that may have been made, if any. You should con-
13 sider the interest of a witness in testifying as he did, and,
14 remember, that it is the quality, not the quantity of the
15 evidence that is important.

16 All of the evidence is subject to your scrutiny.
17 You are not forced to accept any of it. You are to accept
18 that which you believe to be true, and once you accept the
19 evidence you believe to be true, you should attribute to that
20 evidence that you find to be true, the value or significance
21 that you think it deserves.

22 In determining whom you will believe and what
23 weight you will give to the testimony of the witnesses, con-
24 sider the nature of the evidence given by them, their bias
25 or prejudice, if any was disclosed, their opportunity to know

and remember the facts about which they testified and their manner and deportment while on the witness stand, their candor or frankness or the lack of it. Their interest, if any, in the result of this trial. The extent to which they are corroborated or contradicted by other proof. The probabilities as indicated by your common sense and sound judgment that the things asserted in their testimony actually existed or occurred, and such other facts appearing in the evidence as will, in your opinion, aid you in determining the extent to which the testimony is worthy of belief.

You should ask yourselves as to each witness what interest or motive did that witness have to testify in a particular manner.

If you determine that any witness did have a motive or interest which might have led him to testify falsely, ask yourselves did he do so, or did he tell the truth notwithstanding any motive or interest he may have had.

Even if you do not doubt the good faith of a witness, you should look out for circumstances which might lead to inaccurate testimony, such as faulty memory or inadequate perception.

Throughout this process you will be using your common sense and understanding to assign to the testimony of each witness the value and weight which best appeals to

your sound judgment.

That is the heart of your function in the case, ladies and gentlemen, sizing up these witnesses, sizing up this proof, using your common sense, your good judgment, to arrive at a true and just conclusion.

You know, witnesses in courtrooms, just like the people you run across in your daily lives, come in all shapes and sizes, from every conceivable background. The personal contribution you make is to judge them, judge their testimony, consider them objectively, fairly, without prejudice.

Your good judgment, your common sense, should help you to determine where you heard the truth. You know, there is a statue of Justice which frequently is depicted as a tall, handsome woman with flowing robes who has a sword lashed to her girdle. She has a blindfold on, holding a set of apothecary scales-- two plates hanging on chains. There is significance to each one of objects which she is wearing.

But I want to talk solely about the blindfold, because justice cannot be blind. To do justice you need good eyes and ears and a very acute sense of alertness. Why is that blindfold there?

The blindfold is there for this specific purpose: the purpose of the blindfold is to depict the complete objectivity of the law with respect to each witness and with

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2 respect to each litigant. In other words, no witness comes
3 to the witness stand preordained as truthful or perjurious.
4 No litigant should be treated in any special way. All of
5 them come before you, euphemistically speaking, as though they
6 were naked, without any taint, without any preferment, to be
7 judged on the basis of what you hear and see in the court-
8 room.

9 The fact that a witness may be an FBI agent, or the
10 fact that the witness may not speak good English, or may
11 contradict himself all over the place, those are not reasons
12 why you should believe everything they say or reject
13 everything they say. Listen carefully, look carefully. If
14 there was a sign that could be put up in front of the jurybox
15 to keep them on the track, it would be "Stop, Look and
16 Listen."

17 I remember as a small boy they used to have
18 railroad track crossings and they had these big signs, "Stop,
19 Look and Listen". That is what a jury has to do.

20 Contradictory statements can sometimes indicate
21 that a person is a liar. On the other hand, lots of honest
22 persons sometimes make slips. These are things that happen
23 in life. Sometimes an ignorant person who stumbles and is
24 awkward and contradicts himself can, nevertheless, come out
25 with the truth. Whereas, another person who is cultured,

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articulate, apparently forthright, can give you a tissue of
3 lies.

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How do you tell? By using your common sense,
your good judgment, and your experience. You know, you
shouldn't be concerned about the fact that you have heard
experts. I will talk about them in a minute. Or that you
have heard men who were highly experienced in certain phases
of law enforcement.

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You can penetrate the aura of expertise by your
good judgment and common sense, just like a little child can
tell almost without the possibility of fault whether that
child is loved or not loved by an older person. You take
the most complicated person in the world, an adult with all
the culture and expertise in the world, and a little girl
of six or seven can penetrate that person's character in a
way that perhaps no adult can ever do.

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Jurors are asked to do a little bit of the same
thing, with one big difference --that they have years and
years of experience behind them.

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I remember once as a student seeing a play given
by the Irish Abbey Players called "Shadow and Substance."
It brought the lesson home to me rather vividly.

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It is the story of a highly cultured clergyman
who lived in Ireland at the time of the troubles, the old

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troubles, not the new troubles. And he had a servant girl, a very uneducated girl who came from the country, with whom he had an extremely happy rapport. He had other clergymen who lived in the same house who were educated men like himself, and he couldn't get along with them. There was a lack of understanding between them.

But this poor untutored servant girl and this highly educated man had a great deal in common. It is unusual, but it exists in life and I am sure that you ladies and gentlemen will have no difficulty scrutinizing this evidence and using your good common sense to arrive at conclusions which appear to be just and fair.

There are two types of evidence from which a jury may properly find the truth as to the facts of the case. One is direct evidence, such as the testimony of an eye witness. The other is indirect or circumstantial evidence, which is proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

The direct evidence can come not only from what the witness says but from what the witness feels, from the use of all his senses. What he hears and what he touches, what he feels, what he senses by any one of his senses.

As a general rule the law makes no distinction between direct and circumstantial evidence, but simply

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requires that the jury find the facts in accordance with all of the evidence in the case, both direct and circumstantial.

In this case it would be essential for you to find each essential element of the crime beyond a reasonable doubt. If you fail to come to this conclusion with respect to any one element, as I have already told you, it is your duty to acquit.

Circumstantial evidence appeals to the common sense and common experience of mankind. These teach us that the known existence of some fact necessarily implies that other facts connected with them exist. Sometimes circumstantial evidence is even more convincing than direct evidence because direct evidence may be dependent upon the memory or observations or truth of one witness; while circumstantial evidence may be based upon the memory or observation or truth of many witnesses who concur or agree upon physical facts which cannot be mistaken or speak falsely.

These newspapers, so much talked about in the case, exhibit 72 and 73, are pieces of circumstantial evidence.

Neither side disputes that an armed robbery took place and that four armed robbers were on the scene, each one of them wearing gloves.

The defendant, by his plea of not guilty, by the

arguments of his counsel, has urged you to conclude that he has been mistakenly identified and that he was not at the scene of the crime on February 9th, 1973, and did not participate in it in any way.

If you accept this conclusion, or if you have a reasonable doubt as to whether he was indeed at the First National City Bank at 505 Southern Boulevard in The Bronx, in the manner depicted by these surveillance photographs, then he must be found not guilty on both counts.

The defense counsel has urged that Mr. Bolla, the bank manager, was mistaken when he gave the description of the incident right after the event. He described a different person light skinned and Spanish speaking, and that his identification of the defendant in the photographs was the result of a police trick or mistake.

The defense counsel also suggests that the FBI Agents, Janson and McCartin, planted these newspapers with the latent fingerprints on them to make a false case against the defendant.

That is a very serious charge, ladies and gentlemen. If you believe that the FBI agents, Janson and McCartin, have sought to frame this defendant, then I suggest that you disregard all of their testimony.

The law says that if you have a witness who lies

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2 on the witness stand, you can do one of two things. You
3 can reject all of the testimony on the ground it is all tainted
4 by falsehood and none of it is worthy of belief. Or you may
5 accept the part which you believe to be credible and reject
6 only that part which you believe to be tainted by falsehood.

7 It is like a person eating a fruit which may appear
8 to be sound and wholesome and suddenly discovering an im-
9 perfection. Some persons will cut out the imperfection and
10 eat the rest of the fruit. Others will reject the whole fruit.
11 That depends pretty much on the extent to which the fruit is
12 tainted. That is pretty much what you do with respect to the
13 testimony of a lying witness.

14 Did Bolla tell you the truth? Did Janson tell
15 you the truth? Did McCartin tell you the truth? You have to
16 ask yourselves these questions because they are very important
17 questions in this case.

18 The government contends that the defendant's
19 identity has been established by any one of three credible
20 sources. One is Bolla's testimony, whom they have asked you
21 to believe.

22 Two is the bank surveillance photographs, many of
23 them I understand have been put in evidence, over 60 of them
24 have been put in evidence and they are worth looking at in
25 time sequence. And,

1 AR

550

2 Three, the latent fingerprints on these newspapers,
3 which I will talk about in a minute.

4 It should be noted that the credibility of Jenkins
5 the fingerprint expert has not been assailed, as far as I can
6 discern. I respectfully suggest that there is little, if any,
7 dispute that the fingerprints on these newspapers are indeed
8 the fingerprints of Cumberbatch.

9 How did they get there? How did these newspapers
10 come here? If FBI Agents Janson and McCartin lied as the
11 defendant says they did, how were they able to produce these
12 fingerprints of Cumberbatch for submission to the FBI
13 fingerprint section in Washington, D.C. by March 12th or 15th?

14 Because this fingerprint expert tells us that
15 these were sent to him by the New York office of the FBI for
16 processing about March 12th or 15th. We know, because there
17 is no dispute about it, that this bank robbery took place on
18 February 9th, 1973.

19 What happened between February 9th, 1973 and
20 March 12th, 1973 as far as these newspapers were concerned?

21 Were Janson and McCartin in league with one another
22 to work out a perjurious case against this defendant?

23 If they were, they committed a crime which is
24 just as serious as the crime with which the defendant is ac-
25 cused.

2 Remember , Jenkins swore that he processed these
3 fingerprints because the processing was necessary in order to
4 make them visible for his examinations. If they were planted
5 on Jenkins, by these perjurious agents, assuming they were
6 perjurious, did Janson and McCartin have some way outside of
7 the FBI office of determining there were prints, and whose they
8 were?

9 It is up to you to determine whether the serious
10 charge of framing this defendant which has been made against
11 FBI Agents Janson and McCartin, is irresponsible, or whether
12 it is supported by any credible evidence in the case. It is
13 one of the most important functions for you to determine in
14 the case.

15 Because you see, ladies and gentlemen, if you
16 accept the fact that these newspapers with the prints of
17 Cumberbatch on them, were where Janson said he found them,
18 in a metal trash can behind the teller's area, and if the
19 other newspaper was found in the Oldsmobile get-away car by
20 McCartin, they constitute links between the defendant and the
21 bank robbery to which you can attribute the probative value
22 which you think it deserves, circumstantial evidence of his
23 presence in the get-away car and his presence in the bank.

24 You should consider that evidence along with the
25 other evidence, to determine whether indeed the man with the

hat and cape and the carbine was Cumberbatch or someone else.

McCartin called the Oldsmobile a Buick at one point and admitted that he signed the affidavit in support of a search warrant after stating he had already told everything he had done in the case.

Are these bona fide mistakes of an honest witness, or are they marks of perjury? The defense suggests that they are marks of perjury. It is for you to determine whether they are or not.

Randall, the assistant bank manager, who was struck on the head and pulled to the bank floor by his tie and then struck again with a hard object as he laid on the floor, testified that he saw eight inches of the barrel of a robber's gun who stole his wallet and tore his trousers. As to the man who first attacked him, according to his testimony, he said "I will remember that man all my life and he had a newspaper under his arm."

Does that indicate to you that there were newspapers in this bank, brought in by these robbers? Or that it is something else that has nothing to do with this case? It is up to you to determine.

Janson, the FBI agent, now in Los Angeles and who was on the witness stand for a very short time, said he found the newspaper, Exhibit 72, the Mohammed Speaks newspaper, in

2 a metal trash can behind the teller's counter, I believe he
3 said 11:30 a.m. on the day of the robbery.

4 Was he lying? Was he there? Did he find it there?
5 Or did he and Mr. McCartin get together later to agree on how
6 to plant a case on the defendant?

7 McCartin says that he found the other newspaper,
8 exhibit 73, the Daily News, this thicker one, in the Oldsmo-
9 bile get-away car. At one point he called it a Buick.

10 It is up to you to decide where he found it, what
11 happened to it after he found it, whether this was processed
12 as a normal, routine function of these agents at the time,
13 or whether they engaged in framing an innocent man.

14 Both sides appear to agree that eye witness iden-
15 tification is fallible, and indeed it is. The government con-
16 tends that it has established beyond a reasonable doubt, how-
17 ever, that the defendant Cumberbatch was indeed at this
18 robbery and that his participation is depicted in the series
19 of bank surveillance photographs placed in evidence. They say
20 that he is the man in the cape and the hat.

21 They contend further that he was identified by
22 the bank manag er, Bolla, on March 5th, 1973, from photographs
23 and in court when he testified.

24 Additionally, the government contends that the
25 defendant can be independently identified from photographs in

evidence, taken shortly before the robbery and at the scene of the crime.

The government further contends that Cumberbatch's presence at the scene of the crime is established by the fingerprints he left on these newspapers, exhibits 72 and 73, which were discarded at the bank and in one of the get-away cars.

It is for you to weigh the entire body of evidence, and to reach a conclusion as to this very crucial disputed issue of identity.

The general rule, addressing myself to the experts you heard, two experts in the case, Mr. Scroggie, the firearms expert and Mr. Jenkins, the fingerprint expert, the general rule is that witnesses are permitted to testify only as to facts and may not express their opinions.

The exception to this rule is the opinion of a qualified expert in some particular technical matter. The expert may testify as to his opinion on a subject concerning which he has special knowledge. Both of these men have special knowledge in their respective fields and this is allowed on the theory that the advice of one experienced and versed in technical or special subjects, will aid the jury. For this reason, he is permitted to express his opinion on matters which are within the area of his special knowledge.

Bear in mind, though, you are not bound by the

2 opinion of the expert witness, his testimony is purely ad-
3 visory. After you consider his qualifications, opinions and
4 reasons, you should give his testimony whatever weight or value
5 you think it deserves.

6 Now, the defendant Cumberbatch did not take the
7 stand to testify in his own behalf. I instruct you that you
8 are to draw no adverse inference from this. Our Constitution
9 guarantees the defendant's right to remain silent throughout
10 the trial and you are not to let the exercise of that right
11 influence you in any way in your determination of his
12 guilt or innocence.

13 You should not speculate as to his reasons for
14 his failure to testify; nor should you permit this matter
15 to enter into your appraisal of the evidence in any way.

16 Upon your oath as jurors, you can not allow the
17 consideration of any penalty which may be imposed upon the
18 defendant if he is convicted to enter into your deliberations
19 or influence your verdict in any respect.

20 The duty of the imposition of sentence in the
21 event of conviction is a heavy duty which rests solely upon
22 my shoulders. It is the responsibility of the court and
23 you should not be concerned with it in any way.

24 Under your oath as jurors, you are not to be
25 swayed by sympathy. You are to be guided solely by the

evidence in the case. And the crucial, hard-core question that you must sift through and ask yourselves is where do we find the truth? This quest for the truth, this conscious search for the truth, is what this case is all about.

If you can leave the courthouse today with an abiding feeling that your verdict rests on the truth, then indeed justice will have been done. If you can not assure yourselves of that, perhaps justice will not have been done.

You are to determine the guilt or innocence of the defendant, Cumberbatch, solely on the basis of the evidence and subject to the law as I charge you, without fear, favor or prejudice. Remember, ladies and gentlemen, it would be a pity after all this effort and all this expense and all the trouble you have gone through, and the court has gone through, if you should be concerned about matters which are not in evidence.

I ask you, please, to avoid exposure to newspapers, to television, to radio and not to allow your minds to be affected by anything outside of the body of the evidence.

All of the evidence is before you, you should consider it all. The arguments of counsel are before you, you should consider them. You must remember the rules of law as I charge you. We are not concerned here with the Ellsberg case, which has been mentioned here, unfortunately, two or

2 three times. We are not concerned here with who the head of
3 the FBI was in 1973, and that has been mentioned here. You
4 must not permit yourselves to be diverted from the evidence
5 in the case into matters which are not before you and not
6 presented to you by the evidence.

7 It is that evidence, and that evidence alone,
8 upon which your verdict must rest.

9 I want to refer very briefly to the lady on the
10 jury who suggested a Spanish language test. You remember
11 Bolla at one point after the robbery said that the person who
12 he identified was Spanish speaking. Then at another point
13 he said, "what he said sounded to me like Spanish," or words
14 to that effect.

15 The evidence is all in, we can't examine anybody
16 as to any Spanish. We can't change what we have, we can't
17 add to or diminish the evidence placed before you. The
18 lawyers have lived with the case, so to speak, and have done
19 their best to present to you every facet of this case which
20 they felt was deserving of your consideration and we must
21 accept it from there.

22 We can not investigate the case over their heads,
23 we can not quarrel with the body of the evidence before us,
24 you must accept that body of evidence.

25 It is like a pathologist who has a slide that he

has to examine, a team of surgeons maybe six floors above his laboratory is anxious to know what the determination is with respect to his finding on this one slide. He is looking at it through a microscope and he is very unhappy that slide doesn't tell him what he would like it to tell him.

Can he get mad at this slide or not? He can not. He is being asked to come to a determination as to what he finds. And you, ladies and gentlemen, when you come back after your deliberations, you are going to be asked a question that is weighted with profound significance, "How do you find, ladies and gentlemen? " It could be interpreted to mean, on the basis of this evidence, subject to the law, you have been asked to recreate these episodes, to look back into the past, to tell us, as far as you can, what happened on February 9th, 1973; what have you found?

You can't speculate evidence into the case. You can't quarrel with anybody because this, that or the other thing wasn't done. The body of evidence is before you and on that evidence and that evidence alone, you must determine whether, subject to the law as charged, you should find the defendant either guilty or not guilty.

If you have a reasonable doubt that the defendant committed both of the offenses here, you should not hesitate to acquit him.

2 If, on the other hand, you find beyond a reasonable
3 doubt, that the law has been violated as charged, you should
4 not hesitate because of sympathy or any other reason, to
5 render a verdict of guilty.

6 The important part of this case is the part which
7 you now, as jurors, are about to play. Because it is for you
8 and you alone to decide whether this defendant is guilty or
9 not guilty. I know that you will try the issues that have
10 been presented to you according to your oath that you have
11 taken as jurors, in which you promised that you would well
12 and truly try the issues joined in this case and a true
13 verdict render. I suggest that if you follow that oath
14 and try the issues without combining your thinking with any
15 emotion, you will arrive at a just verdict.

16 It must be clear to you that once you get into
17 an emotional state or let fear or prejudice or sympathy inter-
18 fere with your thinking, you can not arrive at a true and
19 just verdict.

20 You may find the defendant not guilty of both
21 counts or you may find him guilty of both counts. Or you may
22 find him guilty of count one and not guilty of count two.

23 But remember, as I have previously stated, if
24 you find him not guilty on count one, you must also find him
25 not guilty on count two.

Your verdict must be unanimous with respect to each count. Your verdict should represent the conscientious determination of each and every one of you. Remember, the essence of the jury function is conscientious listening and conscientious explaining.

Each and every one of you should be anxious and willing to explain your point of view and you should be anxious and willing to listen carefully to the point of view of your fellow jurors. You should do this without fear, favor or prejudice.

Please do not speculate facts into the case. Please do not try to supply any missing links. You are here to decide on this evidence, subject to the reasonable inferences to be drawn from this evidence, what the truth is and what significance it has.

Litigated facts in a case are very much like a mosaic in a museum or churches, -- surface decorations that consist of an inlaying of a pattern of small pieces of glass, stone and terracotta. When you are close to the mosaic it is a jumble of colors. When you draw away from it you can discern a relationship between the colors and determine the purpose of the artist.

Litigated facts in a case are sometimes like that. Try to draw away from different aspects. Another suggestion

I might make is that you start with the facts that you think are either undisputed or relatively undisputed and work from those facts to the more troublesome facts.

I think that is all I need to say, ladies and gentlemen. I must give the attorneys an opportunity to take exceptions.

I have been talking now for over an hour and I need a recess. Do not discuss the case until I call you back and tell you that you can begin. At that time the alternates can leave and the twelve jurors remaining can begin their deliberations.

(Recess.)

THE COURT: Are there any exceptions? Since Mr. Cumberbatch is here, would you state whether you have any exceptions to the court's charge?

MR. EPSTEIN: Yes, your Honor. I have one fairly substantial exception and one minor one.

The substantial one is that your Honor advised the jury in reviewing the evidence that the newspapers arrived at the FBI Laboratory on March 12th or March 15th. That is not the evidence as I recall it.

Mr. Jenkins testified that he received the physical evidence on February 15th. That he received Mr. Cumberbatch's fingerprint card March 15th.

That obviously is a crucial point in the whole question of whether or not the FBI agents were falsifying evidence.

THE COURT: Jenkins received the newspapers February 15th, exhibits 72 and 73.

He received the Cumberbatch prints on March 12th or 15th.

MR. EPSTEIN: The other objection is a minor one. Your Honor spent a great deal of time talking about the credibility of witnesses and, of course, it is the government's position that our case does not simply rise or fall with the credibility of witnesses. That the surveillance pictures which are not subject to impeachment one way or another are before the jury and they can rest their determination, if they chose, on those.

THE COURT: I told them that. The government suggests there are three credible sources from which they can conclude he has been identified.

I don't think I want to stress that. I mentioned the surveillance photographs as one source, Bolla's testimony as another credible source or possibly a credible source and the circumstantial evidence as a third.

MR. EPSTEIN: Fine.

THE COURT: The reason I stressed the credibility

of witnesses so much is because the FBI has been charged with framing this man.

MR. EPSTEIN: I understand, your Honor. Of course, it is our position that even if that preposterous suggestion is true, there is independent evidence.

THE COURT: I think I covered that sufficiently.

I am sorry for the slip on this very important point. I should have known better and I will correct it.

Mr. Bloom?

MR. BLOOM: I have several, your Honor.

I would except to, starting chronologically in your Honor's charge to the jury, the reference first to the number of interruptions by one attorney, obviously meaning myself. Thereupon, you felt it necessary when I was summing up to interrupt my summation.

THE COURT: I don't think I said that.

MR. BLOOM: Well, I think you referred to words to that effect. One of the summations was interrupted by your own questions or objections. That is my recollection of the notes I took.

THE COURT: I told them they shouldn't be affected by any rulings of law I made or the colloquy with counsel or instructions to counsel. State your exceptions.

1 AR
2 MR. BLOOM: Except it highlighted that aspect of
3 what occurred in this courtroom.

4 THE COURT: All right.

5 MR. BLOOM: I except to the failure to charge the
6 jury could find there was a professional or personal inter-
7 est on the part of two FBI agents whose credibility I
8 challenged.

9 I except to the failure to charge that an expert's
10 opinion is advisory only and may be rejected.

11 I except --

12 THE COURT: Those are the charged you tried to
13 submit this morning?

14 MR. BLOOM: Yes.

15 THE COURT: I told you I would reject all those
16 charges on the ground they were submitted at the very last
17 minute, after both summations had been completed and after
18 you represented that you had no submissions to make.

19 MR. BLOOM: I except --

20 THE COURT: You can have an exception to my fail-
21 ure to give anything that is in court exhibit 8.

22 MR. BLOOM: I except to your Honor's charge toward
23 the beginning of the charge, they must return a verdict on
24 two counts. Indeed, if the jury is unable to reach a ver-
25 dict, they of course cannot and should not return a verdict.

1
2 THE COURT: You think I should have asked them
3 to return a disagreement?

4 All I said is that they should attempt to agree
5 and return a verdict on each of two counts. It is their
6 duty to try and agree on two counts and their verdict should
7 be unanimous.

8 I don't understand what you are trying to say.
9 What is the instruction you are asking me to give them now?

10 MR. BLOOM: Well --

11 THE COURT: You mean to return a verdict or a
12 disagreement as you chose, is that right?

13 MR. BLOOM: No. I would ask you to clarify what
14 the alternatives are. You said you must return a verdict
15 as to two counts. That implies no matter what their con-
16 science dictates, somebody is going to have to compromise.

17 If they can't return a verdict as to either or
18 both counts, there is an acceptable although unpleasant
19 alternative.

20 THE COURT: I think it is sufficiently covered
21 by my charge. I told them that the verdict should be
22 unanimous but should represent the honest conscientious
23 determination of each and every one of them.

24 I think that to charge them into disagreement is
25 not consistent with my function and at this stage of the

case would serve no useful purpose.

MR. BLOOM: I except to the language whereby I submit you took the issue of the existence of a conspiracy away from the jury. That was given early in your Honor's charge, indicating particularly that -- I did concede in my summation that the people did not get their by coincidence, but it is for the jury to determine whether or not any agreement existed for a substantial period of time alleged, January to June of 1973.

Your Honor, I submit, by your language took that issue from the jury. I except to that.

I further except, your Honor, in that from your language, you took the issue of proof of insurance, that is, FDIC from the jury. That is an issue for them to consider and by your language, I submit you took it from them.

THE COURT: Proof of insurance?

MR. BLOOM: The institution at 505 Southern Boulevard, that that institution was federally insured.

THE COURT: You got an exception to that point on the record.

MR. BLOOM: Yes. I am making my exception to the charge, the manner in which your Honor instructed the jury.

THE COURT: Very well.

1
2 MR. BLOOM: On two occasions your Honor said there
3 was no dispute there was a bank robbery and all the men wore
4 gloves. I an no time conceded that all the men were wearing
5 gloves either at the time the bank surveillance pictures --
6 we know that the pictures do not begin at the instant the
7 bank robbery began. We do not --

8 THE COURT: Don't all the bank surveillance pic-
9 tures show they all had gloves on?

10 MR. BLOOM: My viewing of the surveillance photo-
11 graphs seems to indicate that you can't see one way or the
12 other whether the man identified as Washington has gloves on.

13 THE COURT: I will tell them they should not
14 accept any interpretation that I place on any of the pic-
15 tures, it is up to them to interpret them and determine what
16 they can see. I will caution them as to that.

17 MR. BLOOM: If you could tell the jury that it is
18 not conceded that they were all wearing gloves during the
19 entire bank robbery.

20 THE COURT: You concede there was a bank robbery
21 but not the wearing of the gloves.

22 MR. BLOOM: That is correct.

23 THE COURT: I will tell them that.

24 MR. BLOOM: If you tell them this, it will clarify
25 the issue, the testimony was from Mr. Bolla that the pictures

1 didn't begin until sometime after the robbery itself began.

2 THE COURT: I won't go into that. I think they
3 know that. I am sure they know it wasn't an instantaneous
4 photographing from the moment they entered the bank.
5

6 MR. BLOOM: I would hope they know everything they
7 heard. But your Honor chose to select certain parts of the
8 testimony. I am asking you to select that part of the
9 testimony and highlight that as you highlighted certain
10 other parts.

11 THE COURT: You want me to tell them that the
12 photographing started --

13 MR. BLOOM: Sometime into the bank robbery.

14 As to referring to Mr. Irvin, the man who looked
15 out the window, you used the language if Mr. Cumberbatch was
16 one of the men Mr. Irvin saw, and then went on mentioning
17 a certain point. There is no testimony in any way that Mr.
18 Irvin was in a position to see any of the people to make
19 an identification, so that is not an issue in this case.

20 THE COURT: I didn't say he identified anybody.

21 MR. BLOOM: I know that.

22 THE COURT: Except that they were all black and
23 one was Hispanic and a young girl who ran across the street
24 to St. Ann's Avenue, and one wore a hat with a brim and a
25 cape or coat.

1 AR
2 MR. BLOOM: The language suggests there was some
3 kind of identification by Mr. Irvin. I would ask that that
4 be clarified, please.

5 THE COURT: Do you think that as I referred to
6 the Irvin testimony I indicated him as an identifying witness?

7 MR. BLOOM: There was a suggestion that identifi-
8 cation by Mr. Irvin was an issue one way or another.

9 THE COURT: I will eliminate that. I did not
10 identify anybody.

11 MR. BLOOM: On two occasions, one shortly after
12 the other, your Honor charged that if you conclude that Mr.
13 Cumberbatch was not there, and then went on to explain that
14 they should acquit.

15 I submit that that is the wrong standard. That
16 suggests there is a burden on the defense to prove that he
17 was not there. The standard is do you believe beyond a
18 reasonable doubt that the government has shown that he was
19 there.

20 THE COURT: I hammered that point so hard I don't
21 want to hit it again.

22 MR. BLOOM: On another occasion you indicated that
23 Mr. Randall was struck with the barrel and used the words,
24 this carbine.

25 THE COURT: No, I said hard object.

1 AR
2 MR.BLOOM: At one point your Honor said this
3 carbine, which suggests to the jury your Honor's view or
4 a finding of fact by your Honor that it was in fact a real
5 gun, as opposed to something made of some other substance.

6 THE COURT: He wasn't able to identify it. The
7 only basis upon which they could conclude it was a carbine
8 was the picture, but I didn't intend to say that.

9 Are you sure I said that he was struck by a car-
10 bine?

11 MR. BLOOM: Well, I can't be sure. I try to write
12 down everything as quickly as I can as you say it so I
13 won't be diverted by another thing.

14 THE COURT: I will try to correct that. Randall
15 said that he was hit by a hard object, and the picture would
16 indicate that he was struck by the barrel of a carbine.

17 MR. BLOOM: Once you did say by a hard object and
18 then, within the next few sentences, you say this carbine.

19 THE COURT: I will try to correct that. I cer-
20 tainly didn't intend to give that impression.

21 I will give a general charge that those photo-
22 graphs have to be interpreted by them and not by me.

23 MR. BLOOM: With regard to the second count, your
24 Honor, and the unlawfulness aspect of it, I submit that
25 your Honor's charge to the jury took the issue from the jury.

1
2 In submitting 436, some sub-division of 436, there
3 is no proof in this case of the unlawfulness of the possession
4 of the weapon.

5 THE COURT: I can take judicial notice of local
6 laws, Mr. Bloom.

7 MR. BLOOM: I understand that, but that has not
8 been done. The first time that was done, your Honor, was in
9 the charge. That was not presented to the jury as evidence
10 in this case as to what the law is.

11 THE COURT: It doesn't have to be. I don't have
12 to present them with the Administrative Code any more than
13 I have to present them with the United States Code as
14 evidence. I can take judicial notice of those legal pro-
15 visions and charge them.

16 MR. BLOOM: Secondly, I submit that a violation
17 of the Administrative Code is not the unlawfulness required
18 by the statute.

19 THE COURT: That is a point you made, and made
20 very forcibly in this case and you can have an exception.

21 I told you the case that I was relying on, United
22 States against Howard, and that if there is any appeal in
23 this case, the Second Circuit could very well disagree with
24 it.

25 MR. BLOOM: That is an Eighth Circuit case, your

Honor, Howard?

THE COURT: I think so.

MR. EPSTEIN: It is a Fifth Circuit case.

MR. BLOOM: That is correct, I am mistaken.

THE COURT: I am glad to be corrected. I was beginning to be a little embarrassed because I rejected another Eighth Circuit case.

MR. BLOOM: Well, your Honor has relied on a Fifth and a Ninth Circuit case and chose not to rely on an Eighth Circuit case.

I think it is not a matter of numbers, but I think it is your own choice.

THE COURT: It is an issue that is wide open in this circuit and the Supreme Court hasn't spoken on it and there is not much jurisprudence on the point. So it may well be that this second count won't pass muster if there is a conviction, I don't know.

I did the best I could and it looked as though unlawful is an all-encompassing term that could include violations of either federal, state or local law.

If I am wrong and you are right, that is the end of it. The issue is very clearly delineated and you have your exception all the way down the line.

MR. BLOOM: Next, as to the second count, your

Honor. The stipulation Mr. Epstein and I entered into was that there was no permit issued for a Mark 3 Commando weapon issued to Mr. Cumberbatch.

The Administrative Code, as I read it, indicates that what they do at the Firearms Control Board is they issue, if anything, a permit to carry a long weapon, an y long weapon.

There is no stipulation, no evidence in this case one way or another, as to whether or not there was any permit issued to Mr. Cumberbatch for a long weapon.

I submit that on that ground, that your Honor should instruct the jury that they should consider that in this thing and, indeed, before that, I would ask that this count be dismissed for want of proof.

THE COURT: What do you say as to that, Mr. Epstein?

MR. EPSTEIN: Your Honor, to my understanding, there is a license is required for a specific weapon, not in general.

MR. BLOOM: This is not evidence, but I can tell you of my own personal experience. Some years ago I made application for and had a permit. It is for any long weapon.

What happens is the procedure is you have a c ertain period of time in which to go in and add it, put it on some kind of paper.

1 AR
2 THE COURT: What is the stipulation? Will you
3 repeat the stipulation?

4 MR. EPSTEIN: It is my recollection that the
5 stipulation was that there was never issued to Victor
6 Cumberbatch a permit by the New York City Firearms Control
7 Board for possession of a Mark 3 Commando semi-automatic
8 rifle.

9 MR. BLOOM: I agree with that.

10 THE COURT: I think my charge was even more
11 favorable to the defendant than the stipulation would in-
12 dicate. I don't think that I have said anything to prejudice
13 him and I prefer not to over-emphasize it. I think I
14 said enough.

15 MR. BLOOM: At one point in the charge your Honor
16 asked the question of the jury, did Mr. Bolla, Mr. Janson
17 and Mr. Mc Cartin tell the truth? That suggests to the
18 jury that my position was that the three of them were lying.

19 My position was quite different from that as to
20 Mr. Bolla. That is what it was as to the other two.

21 THE COURT: I told them that you suggested that
22 Mr. Bolla was either mistaken or was the victim of police
23 trickery. I told them that.

24 The truth can come from a witness acting in good
25 faith whom you attack as being mistaken. I don't see that

I have eliminated your contentions. In fact, I stated your contentions.

MR. BLOOM: Moving to the next point, your Honor, I submit that your Honor provided an argument that is appropriate not for the court but for the United States Attorney in that your Honor spent some time on how did Janson and McCartin know Mr. Cumberbatch's fingerprints were going to be on the newspapers they submitted to Washington.

I submit that that is an improper comment, improper instruction on the evidence and on that ground I ask a mistrial be declared.

THE COURT: Denied. You made the charge that the two FBI agents framed your client. That is a very serious charge for you to make and they've got to ask themselves a number of questions in respect to that.

MR. BLOOM: That is correct. In fact, Mr. Epstein had an opportunity to respond to that and didn't respond to that.

I submit that the manner in which you provided it to the jury was, in addition, a partisan response.

THE COURT: You may have an exception.

MR. BLOOM: At another point your Honor told the jury it was their function to determine whether or not the man with the carbine was Mr. Cumberbatch or somebody else.

1
2 This was referred to earlier, a second time where your
3 Honor used the language, implying that the instrument shown
4 in the photographs was in fact an actualy weapon rather than
5 an imitation weapon.

6 I believe your Honor said -- I don't recall,
7 frankly, if you said you were going to clarify it. If you
8 do --

9 THE COURT: I was going to clarify Randall's tes-
10 timony. I don't know how I can refer to it, as a long
11 barrel firearm or an imitat,ion firearm. I don't want to
12 get into that.

13 MR. BLOOM: An instrument.

14 THE COURT: You want me to refer to it as an instru-
15 ment?

16 MR. BLOOM: The point is it is a jury determination
17 as to whether or not it is an instrument such as falls with-
18 in 924 C, as defined by 921.

19 THE COURT: I told them when I charged them on
20 the second count that it is for them to determine.

21 MR. BLOOM: My point is on two occasions you said
22 the man, whether the man with the carbine was MR. Cumber-
23 batch, implying you own view it was in fact a genuine weapon.

24 THE COURT: I will tell them they must not
25 attribute to anything I said any conclusions which are

binding of them. I have no such intention.

MR. BLOOM: Further, your Honor, I submit that your Honor provided a partisan argument to the jury in discussing some of Mr. Randall's testimony, in that he said that he would remember that man all his life. Part of that was that he would remember that man with the tan coat all his life.

THE COURT: That is right. I didn't say man with tan coat. He was referring to the man with the tan coat, "I will remember that man all my life, he had a newspaper under his arm."

MR. BLOOM: Well, I beleive the testimony will reveal he included in that statement, the important fact that the man had a tan coat, and that of course --

THE COURT: I didn't imply that man was the defendant.

MR. BLOOM: No, you did not. I am not saying that.

THE COURT: I didn't quote all the testimony.

MR. BLOOM: I am saying that it highlights part of the testimony that is consistent with Mr. Epstein's view of Mr. Randall's testimony. It ignores the important fact that it would look as if Mr. Randall made an error in one aspect of his identification of Mr. Washington.

THE COURT: To me it is a complete irrelevance,

so long as I didn't convey the impression that he was talking about the defendant, I don't think that you have any right to complain.

MR. BLOOM: I am not saying that you did that.

THE COURT: Then I decline to change anything I said.

MR. BLOOM: Your Honor, I submit, gave a partisan argument to the jury when you indicated that these newspapers were brought in by the robbers. I submit that the language you used was more appropriate as partisan argument and inappropriate in --

THE COURT: Did I tell them that the newspaper was brought in by the --

MR. BLOOM: I wrote down, brought in by these robbers. Under the section where you were discussing Mr. Randall's testimony.

My recollection of what your Honor said was, you were making the argument, saying there were newspapers found on Mr. Randall's desk and they should consider what effect that has as to whether or not the newspapers that Mr. Janson says he found were brought in by the robber or robbers.

I suggest to your Honor that that is an argument that would be, of course, proper for Mr. Epstein to point

1
2 out they could use in evaluating Mr. Janson's testimony,
3 but inappropriate for the court to offer that material.

4 THE COURT: I think you are not paraphrasing my
5 charge correctly. I never said there were newspapers on
6 his desk and I may have posed the question they should ask
7 themselves, but I won't change my charge in that respect.

8 MR. BLOOM: Next, in speaking of Mr. McCartin
9 and Mr. Janson, you asked the jury to consider whether or
10 not these two men were framing him as an innocent man.
11 They could have thought he was guilty and decided to add to
12 the evidence available, and that is as much a violation of
13 ethics or law as actually setting up a frame on a known
14 person.

15 You don't want me to tell them they framed a
16 guilty man, do you?

17 MR. BLOOM: No. It would have been appropriate
18 not to say that at all.

19 THE COURT: What else do you have?

20 MR. BLOOM: The issue of whether or not Mr.
21 Ellsberg's trial was reported in the Daily News was a
22 legitimate issue to refer to. Whether or not the newspaper,
23 the Daily News, had been handled by someone in order to
24 conceal a weapon or, on the other hand, consistent with a
25 person who had read the newspaper.

1 AR
2 The reason the fingerprint was on page 9 was --
3 it makes sense that Mr. Cumberbatch would be interested in,
4 or any human being would be interested in reading that
5 topical story at that time.

6 To suggest that is not an issue, takes away from
7 the jury their ability to become open fact finders.

8 THE COURT: I told them. I don't have to tell it
9 to them again that it has nothing to do with the Ellsberg
10 case, with Watergate, with Mr. Gray or Mr. Hoover or any-
11 thing else. You tried your best to inject those irrelevan-
12 cies into the case, even after I warned you not to do so,
13 to ask these questions and you got it in nevertheless and
14 mentioned it in summation.

15 MR. BLOOM: With regard to the Spanish aspect, you
16 were addressing yourself to the note of one of the jurors
17 and you indicated that Mr. Bolla at one time said that the
18 person spoke Spanish.

19 What he actually said was that the person he
20 believe spoke fluent Spanish. I believe that was appropri-
21 ate and would have been appropriate and I ask your Honor
22 now to charge the jury that there is no dispute that Mr.
23 Cumberbatch can not speak Spanish.

24 It is uncontradicted on the record. Mrs. Atkins
25 in uncontradicted in that regard as to Mr. Cumberbatch's

2 ability to speak and understand Spanish.

3 THE COURT: I said he referred to a man, light
4 skinned and Spanish speaking.

5 MR. BLOOM: Yes.

6 THE COURT: I refuse to go over it any more.

7 MR. BLOOM: I would ask your Honor to make mention
8 of Mrs. Atkins' testimony in that regard.

9 THE COURT: Unless the government stipulates I
10 can't tell them anything was undisputed. They can accept
11 or reject the testimony as they wish.

12 MR. BLOOM: Your Honor, I submit that your Honor
13 indicated that there is no real dispute as to whether or
14 not a bank robbery took place.

15 THE COURT: That's right. You yourself told that
16 to them in summation and I suggest to them there is no dis-
17 pute in the case with respect to that because this, in
18 effect, is what you told them.

19 MR. BLOOM: Lastly, your Honor, I except to the
20 manner in which you suggested to the jury how it go about
21 deliberating in this case. That is, to decide upon basically
22 the undisputed facts first, or those about which there is
23 not much dispute.

24 That is taking their function away from them. It
25 is for them to decide how to deliberate and not for the

court nor Mr. Epstein nor myself.

THE COURT: All right, thank you.

I will tell them the things I said I would cover.

Call the jury back.

(Jury present.)

THE COURT: Ladies and gentlemen, there are two or three things that I would like to correct and caution you about.

In the first place, I may have made statements to the effect that certain bank photographs showed certain things. Now, please, do not conclude that I have made any findings for you.

I am making humble suggestions as to what I think you would find if you look at them. But it is up to you, and I can't say this often enough or with any greater emphasis, you and you alone will decide what you see on those photographs and what those photographs mean.

I do not, by anything I said, want to take that function from you.

Mr. Bloom asked me to state that while the defendant concedes that a bank robbery did take place at the time and place mentioned in the indictment, he has not conceded that the robbers were wearing gloves.

That contention was made, I think, by the govern-

ment and it is up to you to look at these photographs and conclude whether you can see that or not.

Again, I do not wish to attribute to Mr. Bloom a concession he didn't make, nor do I wish to be making any findings myself.

Also, Mr. Bloom wishes me to state something I think is clear from the evidence, that the bank surveillance cameras didn't start to function until sometime into the bank robbery. The length of the robbery has been estimated to be somewhere between three and five minutes and it is, I think, clear that the bank cameras didn't start until sometime into the bank robbery.

With respect to the second count, I apparently referred to this instrument that is in exhibit 54 as a carbine and perhaps I used the word Commando Mark 3, I don't know.

But please do not feel that I am making a finding for you, which constitutes the second essential element of count two.

The second element, as you recall, is that you have to determine beyond a reasonable doubt is whether the defendant was carrying a firearm and I defined firearm as a weapon which is designed or readily converted to expel a projectile by action of an explosive or by the frame or

receiver of such a weapon.

I told you that you heard the expert's testimony in this case and that the expert, Mr. Scroggie, testified in a certain sense, but it now entirely up to you to determine whether the gun depicted in the photographs which Mr. Scroggie considered was indeed a firearm.

I also told you that it was not necessary for the government to prove that the gun was operable.

So the important point I am trying to make now is that if I made a reference to that instrument as a carbine I was not trying to jump over your heads and say I find it is a carbine, therefore you must find it is a carbine.

Please, ladies and gentlemen, with respect to that or any other statement I may have made, I told you and I repeat, I want you to determine the facts, I want you to determine what you see in the pictures.

You have to weigh the testimony of the witnesses and it is not I who wishes to supplant you and you must not construe anything I said as any intention to supplant your exclusive fact finding function.

Lastly, I made a rather serious slip in discussing the fingerprint expert and the receipt of these newspapers.

I think you recall when I discussed these newspapers, I said that they got to Mr. Jenkins in the FBI

1 fingerprint laboratory on March 12th or 15th. I was mis-
2 taken.
3

4 What he got on March 12th or 15th were not the
5 newspapers. He got the fingerprints of Mr. Cumberbatch.
6 He got the inked impressions.

7 He received the newspapers, according to his
8 testimony, exhibits 72 and 73, on February 15th, which was
9 within a week after the robbery.

10 Keep those dates in mind. Jenkins, the finger-
11 print expert, got those on February 15th. It wasn't until
12 March 12th or 15th that he got the Cumberbatch ink impressions
13 from which he could make a comparison.

14 Meantime, he said he did make a lot of other
15 comparisons with particular prints, but he made the Cumber-
16 batch comparisons after he got them on March 12th or 15th.

17 I am sorry I made that slip and I apologize .
18 That is what the evidence shows. I wanted to correct that.

19 I don't think I have anything else.

20 I hope the alternate jurors will accept my thanks
21 and the case is now in your hands.

22 MR. BLOOM: Excuse me, your Honor, before that
23 happens, may we come to the side bar?

24 THE COURT: Yes.

25 (At the side bar.)

MR. BLOOM: Your Honor, if I may, with respect to the gloves aspect, the impression here was really a significant difference. You said defense counsel did not concede the bank robbers wore gloves. What I was saying is that I do not concede all the bank robbers wore gloves. That is a big difference.

(In open court.)

THE COURT : Mr. Bloom is asking me to correct the concession about the bank robbers and the gloves. He does concede that there was a bank robbery at the time and place mentioned. He does not concede that all of the robbers wore gloves. He concedes that some of them may have worn gloves but he says that according to these photographs, as he sees them, and suggests that you see them, you can't tell whether all of the bank robbers are wearing gloves.

I will leave that up to you ladies and gentlemen, as I said before. You and you alone will determine what is in the photographs and that they mean.

I didn't want to misquote Mr. Bloom's concession. Is that satisfactory?

MR. BLOOM: Yes, essentially.

THE COURT: Thank you, ladies and gentlemen, you may retire.

(Marshal sworn by the clerk.)

OPINION OF THE DISTRICT COURT

E.P. CR 65

OPIN 570

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

-against-

76 Cr. 1076
(ELP)

VICTOR CUMBERBATCH,

Defendant.

-----x

A P P E A R A N C E S

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PALMIERI, J.

The defendant moves to dismiss the present indictment (76 Cr. 1076) on six different grounds. For the reasons set forth hereinafter, the motion is denied.

The complex history of this case may be summarized as follows: Cumberbatch was indicted for armed bank robbery under 18 U.S.C. §§ 2113(a), (b) and (d) in 1973 (73 Cr. 319). On October 23, 1973, he was produced from state custody pursuant to a writ of habeas corpus ad prosequendum and entered a not guilty plea. The Government filed a notice of readiness for trial on December 18, 1973. Raul Estremera, a co-defendant, was tried and convicted in May 1975. Cumberbatch was unavailable to be tried at that time because he was on trial in state court. The state trial ended in late June of 1975, and in July the Government requested a pre-trial conference to clarify the question of Cumberbatch's representation. That conference was held September 9, 1975, and attended by a Legal Aid Society representative and by Robert Bloom, Esq., Cumberbatch's present attorney. Cumberbatch was produced at that time by a writ of habeas corpus ad prosequendum. No trial date was set at that conference because of Mr. Bloom's extensive trial commitments for the ensuing months.

In April 1976, Judge Duffy set June 7, 1976, as the trial date. Although by letter dated April 26, 1976, Mr. Bloom objected to the June 7 trial date, that date was not changed by the court. Accordingly, in May, Cumberbatch was again produced from state custody on a writ of habeas corpus ad prosequendum in anticipation of the June 7 trial. On June 7, Mr. Bloom informed the court that he was engaged in a state trial, and the court thereupon fixed July 13, 1976, for the trial. Although Mr. Bloom requested at that time that Cumberbatch be kept in federal custody so as to enable him to prepare for trial, the writ was satisfied and Cumberbatch returned to state custody because of the overcrowded conditions at the Metropolitan Correctional Center and because of concern that he might attempt to escape. Because Mr. Bloom was still engaged in the state trial on July 13, the trial on the 1973 indictment was adjourned sine die at that time.

On August 12, 1976, Cumberbatch moved to have the 1973 indictment dismissed on the ground that the Government had failed to comply with the requirements of the Interstate Agreement on Detainers ("IAD") (18 U.S.C., App.). Judge Duffy denied the motion to dismiss on September 18, 1976. Subsequently, the Court of Appeals decided United States v. Mauro, ___ F.2d ___ (2d Cir., October 26, 1976) which raised a doubt about the validity of

the 1973 indictment.¹ On October 29, 1976, the case was transferred to this court for trial. On November 23, 1976, the Government obtained a "supplementary" indictment charging Cumberbatch with conspiracy (18 U.S.C. § 371) and carrying a firearm during the commission of a felony (18 U.S.C. § 924(c)(2)). The Government acknowledges that both indictments are based on the same underlying incident. Over the Government's opposition, this court dismissed the 1973 indictment on the ground that the Government had failed to comply with the IAD, as construed by the Court of Appeals in Mauro.

The defendant's first argument in its motion to dismiss the present indictment relies on the IAD and the Mauro decision. He argues that the supplementary indictment should be dismissed because it was obtained solely for the purpose of circumventing the Mauro holding and avoiding the requirements of the IAD. The Government responds that neither Mauro nor the IAD requires dismissal of the present indictment. This court's dismissal of the 1973 indictment, the Government argues, only precludes reindicting the defendant on the same charges alleged therein, not all possible charges arising out of the incident underlying the 1973 indictment.

The Second Circuit in Mauro did not consider the possible alternatives available to the Government after

the dismissal of an indictment under Article IV(e) of the IAD, and the parties have not cited to this court any controlling authority on this issue.

While it appears that the defendant is correct in asserting that the Government's purpose in reindicting Cumberbatch was to salvage its prosecution in the face of the Mauro holding, the facts of this case suggest that this defendant should not be permitted to avail himself of the benefits of the IAD. The purpose of the IAD, as stated in Article I, is "to encourage the expeditious and orderly disposition of [untried indictments, informations or complaints]" in order to remove "uncertainties [in a defendant's future] which obstruct programs of prisoner treatment and rehabilitation." Although the defendant has been afforded several opportunities for a speedy trial, he has, through his counsel, repeatedly sought lengthy adjournments. In fact, the Government's failure to comply with the IAD in June of 1976 was in part caused by Cumberbatch's attorney's failure to make himself available for the June 7 trial which Judge Duffy had set. These delays have directly served the defendant's trial tactics which have thoroughly exploited the passage of time, the alleged inconsistencies among government witnesses, and the Government's alleged failure to sustain its burden of identifying the defendant at the scene of the bank robbery.

Since Cumberbatch has repeatedly obstructed the "expeditious and orderly disposition" of this case, it is highly inappropriate to permit him to take advantage of a statute whose purpose is to encourage such a disposition. Moreover, Cumberbatch has not contended at any time that his program of rehabilitation was adversely affected by his being returned to state custody. The only prejudice he has alleged is that his return made it difficult for him to communicate with his attorney, a problem which the IAD was not intended to address. In view of this factual background, it would be improper for this court to extend the Mauro holding to include the supplementary indictment in this case.

The defendant's second argument is premised on the "same transaction" test in the double jeopardy area which was enunciated by Justice Brennan in his concurring opinion in Ashe v. Swenson, 397 U.S. 436 (1970). In Ashe, the Supreme Court held that the doctrine of collateral estoppel was included in the fifth amendment's guarantee against double jeopardy. Justice Stewart, writing for the Court, did not adopt the "same transaction" test, and, thus, it has not been held to be part of the collateral estoppel element of the Double Jeopardy Clause. Moreover, the collateral estoppel argument is wholly inapplicable to this case. As the Court in Ashe stated, collateral

estoppel bars the relitigation by the same parties of an issue of ultimate fact which has been determined by a valid and final judgment. 397 U.S. at 443. No such fact has been litigated in the present case, and, thus, the collateral estoppel rule does not apply.

Cumberbatch's third ground for dismissal is based on "general speedy trial principles." His attorney indicated in court that this argument is addressed to the court's discretion to dismiss the indictment because of undue delay under F. R. Crim. P. 48(b) and under the Speedy Trial Act, 18 U.S.C. §§ 3161, 3162, 3163.

The defendant has not demonstrated any basis for dismissing the present indictment because of delay by the Government either prior to the indictment or after it. With respect to the pre-indictment period, he has not shown that any delay in indicting him has caused substantial actual prejudice to his right to a fair trial or that the Government used the delay as an intentional device to gain a tactical advantage over him. United States v. Marion, 404 U.S. 307, 324 (1971); United States v. Vispi, ___ F.2d ___, (2d Cir., November 15, 1976). Moreover, the approximately three and one-half year delay between the crime charged here and the filing of the supplementary indictment does not violate any standard established in this circuit. As the Second Circuit has

reaffirmed recently in the context of pre-indictment delay, the "primary guardian of the individual's rights is the statute of limitations," United States v. Vispi, supra, slip op. at 515. See also United States v. Ewell, 383 U.S. 116, 122 (1966). The Court of Appeals has countenanced delays which were comparable to, and in excess of, the period involved here. See e.g., United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975); United States v. Ferrara, 458 F.2d 868 (2d Cir.), cert. denied, 408 U.S. 931 (1972).

With respect to any alleged post-indictment delay the Supreme Court has indicated that the courts should employ a balancing test, considering four factors as particularly relevant: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of his rights; (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). In the context of the history of this case, discussed above, an analysis of these factors clearly demonstrates that the defendant has not been denied his right to a speedy trial. The length of the delay, though substantial, is not inordinate, and the reasons for the delay clearly justify its duration. The defendant has not demanded a timely trial and, in fact, has delayed it considerably. Finally, not only has he not shown any prejudice from the delay, he has exploited

it to his advantage as already indicated and by being tried alone and separately from his already convicted accomplices. Co-defendants Monges and Washington pleaded guilty on May 4, 1973, before Judge Duffy of this court. Estremera was tried and convicted before Judge Duffy on May 23, 1975.

It is unclear from the defendant's general reference to 18 U.S.C. §§ 3161, 3162, and 3163 what arguments he contends support his motion to dismiss under the statute. Since the possible arguments arising from these provisions are comparable to those the defendant raises with respect to the Southern District Plan for Prompt Disposition of Criminal Cases ("the Plan"), the discussion of defendant's arguments based on the Plan is sufficient to deal with them.

It should be noted that the defendant has asserted, without any supporting evidence, that the supplementary indictment was sought by the Government in order to "get" Cumberbatch who is allegedly a member of the "Black Liberation Army." The Government flatly denies this unsupported allegation and represents that the evidence at trial will sufficiently demonstrate the defendant's participation in a particularly violent crime.

Cumberbatch raises three arguments based on the time limits set forth in the Plan. First, he argues he was not arraigned within ten days of the filing of the supplementary indictment, as required by Rule 4(a) of

the Plan. A similar requirement appears in 18 U.S.C. § 3161(c). While the defendant was not arraigned within the ten day period, the applicable rules do not require dismissal of the indictment. Under Rule 11(e), the court may dismiss for failure to comply with the time limits set forth in the Plan but it is not required to do so. Here, a timely arraignment was impossible due to the severe weather conditions in upstate New York where the defendant was being held in state custody. These weather conditions caused the closing of the Buffalo airport and delayed the transfer of the defendant to the Southern District. Under such circumstances, dismissal of the indictment is not warranted under Rule 11(e). See also 18 U.S.C. § 3163(c) which suspends the effective date of the sanctions provisions of the Speedy Trial Act (18 U.S.C. § 3162) until July 1, 1979.

Second, Cumberbatch argues that the present indictment should be dismissed because it was not timely filed under Rule 3(a) and 3(b) of the Plan. Following defendant's argument, the Government should have been required to file the present indictment on or before September 1, 1976. He contends that under Rule 3(a)(1) the indictment had to be filed within 60 days of July 1, 1976, because under Rule 3(b) Cumberbatch must be deemed to have been arrested at some time prior to July 1, 1976. Defendant's argument, however, fails to consider the

applicability of Rule 5(d) which governs superseding indictments and indictments charging a defendant with an offense required to be joined with those charged in earlier indictments. Rule 5(d)(5) provides:

(5) The time within which an indictment or information must be obtained on the subsequent charge, or within which an arraignment must be held on such charge, shall be determined without regard to the existence of the original indictment or information.

It is unclear from the Plan how the courts are to apply the time limits set forth in Rule 3 to subsequent indictments governed by Rule 5(d)(5). It is highly unlikely that the Plan envisioned a requirement that all subsequent indictments be filed within 60 days of a defendant's arraignment on the original indictment, as Cumberbatch argues. In the present case, it is more reasonable to deem Cumberbatch's arrest with respect to the supplementary indictment to have occurred at the time at which he was held in custody "solely for the purpose of responding to a Federal charge." Rule 3(b)(i). In any event, the court is not required to dismiss this indictment because of untimely filing, Rule 11(e), and under the facts of this case it would be inappropriate to dismiss it.

Finally, Cumberbatch argues that the indictment must be dismissed because the Government was not ready for trial as required by Rule 7 of the Plan. Rule 7 requires that the Government be ready for trial within

six months of the earliest of three dates: (1) the date of arrest; (2) the date on which the defendant is served with a summons; (3) the date on which a complaint, indictment, or information is filed. The Government's notice of readiness on the 1973 indictment was filed December 18, 1973, and was unquestionably timely. Its notice of readiness on the subsequent indictment was filed on November 23, 1976, the day the indictment was filed. Although the defendant argues that the November 23 notice was untimely, his argument overlooks the fact that Rule 5 alters the time limits with respect to subsequent indictments. Under Rule 5(d)(2), if the original indictment is pending at the time the subsequent charge is filed (as was the case here), the trial must commence within the time limit applicable to the commencement of trial on the original indictment. Accordingly, in this case under Rule 5(a)(1), the trial must commence on this indictment within 180 days of July 1, 1976. Since trial was actually commenced on December 13, 1976, the Government has complied with its readiness requirement. Moreover, in light of the history of the defendant's efforts to delay this trial, it would be wholly inappropriate for this court to dismiss the present indictment for the Government's failure to file a timely notice of readiness, and this court would refuse to do so under Rule 11(e) even

if the defendant had established that the Government's notice was not timely.

Accordingly, defendant's motion to dismiss is denied.

Dated: New York, N. Y.
December 16, 1976

EDMUND L. PALMIERI
U. S. D. J.

FOOTNOTE

1. In Mauro, the Court of Appeals held that the Interstate Agreement on Detainers committed the United States to all of its terms in the capacity of both a sending and a receiving state. It further held that a writ of habeas corpus ad prosequendum is a detainer under the Agreement entitling a state inmate to the protections provided in Article IV. Specifically, Article IV(c) requires that when a prosecutor initiates the statutory mechanism to produce a defendant imprisoned in another jurisdiction, the defendant is entitled to a trial within 120 days. Article IV(e) provides that if such trial is not had prior to the defendant's being returned to the original place of imprisonment, the indictment, information or complaint that was the basis for the detainer must be dismissed with prejudice.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

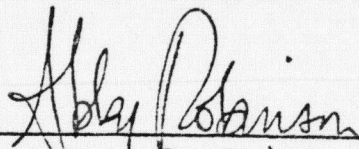
ABBY ROBINSON, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 34 White St.

On April 25, 1977, served the within

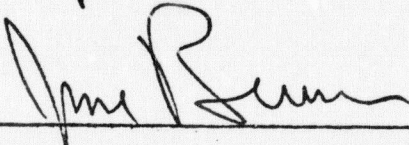
Appellant's Brief & Appendix
upon Robert B. Fiske, Jr. attorney(s)

for Appellee in this action, at

1 St. Andrew's Plaza
NY, NY 10007
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in ~~an~~ ^{an} ~~post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


ABBY ROBINSON

Sworn to before me on
April 25, 1977.


JESSE BERMAN
Notary Public, State of New York
No. 31-5290718
Qualified in New York County
Commission Expires March 30, 1978